BECA-0229
#8

City of Berkeley

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UNIVERSITY OF CALIFORNIA

September 25, 1997

Mr. Marc Levin
University of California, Berkeley
Institute of Governmental Studies Library
109 Moses Hall, #2370
Berkeley, California 94720-2370

Dear Mr. Levin:

As a follow up to your recent request concerning pepper spray use in the City of Berkeley, please find enclosed the following reports, free of charge:

Pepper Spray Task Force - Use of Pepper Spray in Berkeley
Susan Burnett Luten, Pepper Spray Task Force-Minority Report - Use of Pepper Spray in Berkeley
Peace and Justice Commission - Use of Pepper Spray in Berkeley
Police Review Commission - Endorsement of Pepper Spray Task Force's Recommendations
City Manager's Report - Response to Pepper Spray Task Force Report
City Manager's Report - Comparison of Pepper Spray and Mace
Councilmember Dona Spring's Report - Interim Measures on the Use of Pepper Spray, and

If you have any questions concerning these reports, please feel free to call me at the above telephone number.

Sincerely,

Sherry M. Kelly
City Clerk

SMK:cf

Attachments

City of Berkeley

Pepper Spray Task Force
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INSTITUTE OF GOVERNMENTAL
STUDIES LIBRARY

SEP 26 1997

UNIVERSITY OF CALIFORNIA

COUNCIL ACTION
September 9, 1997

To: Honorable Mayor and
Members of the City Council

From: Pepper Spray Task Force

Subject: USE OF PEPPER SPRAY IN BERKELEY

RECOMMENDATION:

That Council end the use of pepper spray by the Berkeley Police Department immediately.

That Council take whatever steps necessary to encourage the legislature to repeal Assembly Bill (AB) 830 and to remove pepper spray from use by private citizens until credible independent information regarding its safety and reliability as a defensive weapon can be established.

That Council take the following local interim measures to protect the health of the community:

1. Direct the City Attorney to investigate the possibility of instituting a local ban on the sale of pepper spray products within the City of Berkeley.

2. If a ban is not possible, stringent restrictions should be developed for over-the-counter sales of pepper spray, that would include the following:

   - Proper age identification for purchase.

   - Develop warning labels for pepper spray products that inform the purchaser of the possible health consequences associated with exposure, and of the unreliability of the products in stopping a determined attacker, or someone under the influence of alcohol or drugs. The label should also encourage purchasers to seek training for the safest and most effective use of the product.

- Direct the City Attorney to investigate the feasibility of retail licensing for the sale of pepper spray products, and of raising the minimum age for purchase to 18 years.

3. That Council direct the City Attorney to develop aggressive measures to hold pepper spray manufacturers accountable and liable for misuse of their products.

4. That Council communicate to neighboring communities the findings of this Task Force on the use of pepper spray in Berkeley and advise them to set up their own task forces to look into the issues.

BACKGROUND:

I. Medical Consequences and Health Effects of Exposure to Pepper Spray

A. Composition and Effects

Capsaicin: The purified parent chemical of the hundreds of components of Oleoresin Capsicum (OC).

Oleoresin Capsicum: An extract of capsicum pepper plants, it is a thick, dark reddish brown liquid concentrate of the active ingredients of capsicum, prepared by percolating solvents through powdered capsicum. When sprayed on humans and animals it causes and exacerbates pain and inflammation.

OC Propellants: Carries the OC from the container (spray can) to the target. Between 90 and 95 percent of the pepper spray material is propellent, the composition of which differs according to manufacturer and may be flammable or contain toxic, poisonous, or cancer causing ingredients. For example, two chemicals that have been used as propellants are methylene chloride (toxic poison, carcinogen) and isopropyl alcohol (toxic, causes corneal burns and eye damage). Most individuals using pepper spray, including police trainers and officers, do not know the propellent ingredients and their effects.

General Effects of Exposure: Causes almost immediate swelling and intense burning of the eyes and breathing passages resulting in watering eyes, blurred vision, uncontrollable coughing, gagging, difficulty in breathing, and gasping for breath. Contact with exposed mucous membranes in the nose and mouth produces intense pain. It will rapidly increase heart rate and blood pressure.

B. Fatalities

To date, over 70 people nationwide and almost 40 documented cases in California have been reported to have died from incidents involving pepper spray exposure and many more have suffered permanent or long lasting health effects. The paucity of nationwide data collection prevents any comprehensive study and analysis of this problem. However, even with precautions available in the form of physical restraint, medical attention and hospital treatment, deaths are still occurring where there are hidden medical conditions unrelated to treatable symptoms or positional asphyxia. (APPENDIX C & E)

C. Long and Short Term Effects On the Body

The summary of the United States Army study states, "Studies using the active ingredient capsicum from OC indicate the material may cause: mutagenic effects, carcinogenic effects, sensitization, cardiovascular toxicity, pulmonary toxicity, neurotoxicity, and human fatalities." {United States Army Report, United States Army ERDEC, 12/93 p. 10}

Dr. Woodhall Stopford supports the findings and conclusions of the United States Army study. The risks related to OC include cancer, loss of vision, brain and nerve damage, liver damage, kidney damage, peptic ulcer disease, chronic airways disease, laryngospasm and respiratory arrest, pulmonary edema, and bronchospasm (APPENDIX A). Anyone with restricted breathing due to bronchitis or even a common cold may have severe reactions after being sprayed. {Stopford, Division of Occupational and Environmental Medicine Education, Duke University Medical Center, 03/22/96}

Eye damage and loss of vision for some period of time commonly result from pepper spray use. Exposure causes a loss of sensation and reaction to chemical and mechanical stimuli (blink reflex) for at least one week, resulting in corneal damage from contact lenses or foreign bodies getting into the eye. [Stopford/Duke University report} Two examples on record are:

> The East Bay Express report (3/15/97) that one year after being sprayed, Margaret Lanier of Berkeley still suffers from skin ailments and recently underwent eye surgery to correct the effects of being sprayed.
>
> An officer of the Anchorage, Alaska Police Department was sprayed in the eyes during full exposure training in the spring of 1996 and developed blisters on the cornea. This incident, the third in the Anchorage Police Department in the least two years, resulted in the loss of over three weeks of work and the failure of the officer's eye to fully heal. {The Medical Implications of OC Sprays, p. 43}

D. Effects on Sub-Populations

The United States Army study concludes with, "There is a risk in using this product on a large and varied population ... because of the limited safety studies conducted on the OC spray Cap-stun. There is also a wide variety of adverse effects in the literature on the active ingredients." {United States Army Report p. 10}

Asthmatics, with a "hidden disability" are particularly threatened by pepper spray use, whether they are the intended targets, bystanders, or the officers themselves. Exposure to pepper spray may precipitate an acute asthmatic attack and may increase the risk of respiratory arrest. {Stopford/Duke University report} Dr. Melissa A. McMarirmid MD, MPH, Director of the Office of Occupational Medicine, OSHA, United States Department of Labor, states, "The death of a 24 year old with a history of asthma illustrates the point that there is a range of individual susceptibility to serious adverse health hazards caused by OC. Unfortunately, an individual's susceptibility to a serious adverse health hazard is usually not known prior to exposure." According to the San Francisco Chronicle (5/20/97), there has been an increase in the rate of asthma and the prevalence and severity among urban schoolchildren now ranks it as their leading cause of serious chronic illness. (APPENDIX B)

Persons under the influence of drugs and alcohol or who are extremely agitated or out of control are at serious risk of injury or death from exposure to pepper spray. Individuals under these conditions may not feel pain and therefore will not notice the physical effects of the spray or react as they are supposed to. Officers may then overexpose the subject in an attempt to achieve the expected result. {David DuBay, Defense Technologies Corporation of America, cited in The Medical Implications of OC Sprays, p. 13.} The March 1994 newsletter of the International Association of Chiefs of Police states that cases have recently been reported where deaths have occurred and warns that factors such as drug and alcohol intoxication and excited delirium can render individuals susceptible to sudden death: "acute alcohol intoxication is a major risk factor because respiratory drive is reduced and subjects do not realize they are suffocating."

Cardiac Problems - The recent death following pepper spraying of a San Quentin inmate who was discovered suffering from an enlarged heart illustrates the potential danger to persons with cardiac problems. According to an American Civil Liberties Union (ACLU) study, 61% of persons who died following pepper spray exposure suffered from heart or respiratory disease (APPENDIX C).

Mental Illness - Reports suggest risks to persons exhibiting bizarre, violent or frenzied behavior, particularly Neuroleptic Malignant Syndrome (NMS). "NMS is another recognized cause of sudden, unexpected death and generally occurs in psychiatric patients who are taking antipsychotic medication. However, NMS may also occur in individuals who are not being treated with such medication. This specific form is often diagnosed as acute exhaustive mania which is poorly understood but may be related to a cardiac event caused by psychological stress. Such stress can induce fatal cardiac arrhythmias, the individual can be "scared to death" {IACP Newsletter, 3/94}. As with drug or alcohol intoxication, subjects that are extremely agitated or mentally ill may not feel pain or react to the pepper spray, causing the officer to continue spraying to achieve the expected results. This can result in overexposure and further serious health risks. Subjects that are under the influence or agitated, mentally ill, or otherwise out of control can also become more violent and aggressive after being pepper sprayed, posing a greater risk both to themselves and to the officers involves.

E. Reported Safety of Pepper Spray

There have been no studies to date showing that pepper spray is a safe, non-lethal alternative or replacement for mace or similar materials. Only the Federal Bureau of Investigations' (FBI) report has purported to find it completely safe. However, the author of that study, Special Agent Thomas Ward, was convicted of receiving more than $57,000 from a pepper spray manufacturer. The most comprehensive, objective studies that have examined its effects have all found that pepper spray has the potential for inflicting damage or death on the persons sprayed. The Office of Health Hazard Assessment of California Environmental Protection Agency has not determined pepper spray products to be safe, only acceptable for limited use until better safety data is collected. {Dubay}

F. International Law

At present, pepper spray has been banned in Australia and Great Britain as a toxic substance and an illegal chemical weapon under the United Nations Biological and Chemical Weapons Convention of 1972. {The London Guardian, 01/11/96}

II. Police Use of Pepper Spray

A. Police Reports

One of the most troubling aspects of the investigation leading to the preparation of this report has been the failure of the Berkeley Police Department (BPD) to provide the information requested by this Task Force and the Police Review Commission (PRC) on the Department's past use of pepper spray. The Department has alluded to approximately 40 incidents of pepper spray use and the Task Force and the PRC have repeatedly requested copies of the police reports relating to these incidents. In addition, requests have been made for Use of Force Reports which officers and their supervisors are required to file whenever pepper spray is used.

The Department contends that the use of force reports are for internal purposes only and has referred the request to the City Attorney for review. The police reports, however, must be released under the terms of the Special Departmental Order concerning the Release of Police Reports and the Information Therein which was issued May 21, 1997 following negotiations between the Department, the PRC, the ACLU, and the First Amendment Project. The Department has chosen, as of the writing of this report, to release only three police reports relating to the use of pepper spray. A fourth report relating to a recent incident was legitimately withheld due to privacy considerations. The conclusions of this report regarding Berkeley Police Department's past use of pepper spray are, therefore, based only on the three available reports as well as testimony presented to the Task Force.

B. Effectiveness Against Suspect Targets

The generally accepted effectiveness figures for police pepper spray use are in the 75-90% range (some manufacturers have claimed 100%). Based on police department surveys, the State of California claims 85% effectiveness. (BPD, Training and Information Bulletin, No. 216) However, these figures may be virtually useless, since they are based on unconfirmed reports from individual departments. There are no agreed upon standards as to what constitutes effective results, no independent confirmation of the figures provided, and no overall objective studies to support or contradict claims of effectiveness as a law enforcement tool.

According to an article in the ASLET Journal of May/June 1996 written by Phil Messina of Modern Warrior Defensive Tactics Institute, individuals, such as police officers in training situations who are told what effects to expect beforehand, were incapacitated by the spray. Several officers were quoted that they would be, "unable to defend their firearm, if sprayed". However, tests conducted by Modern Warrior in conjunction with the American Women's Self Defense Association concluded that a determined, "goal oriented" attacker may be completely unaffected by pepper spray. As of the date of the article, over 200 subjects, every single one tested, "was able to accomplish a short term violent goal after being sprayed." A number of the tests involved arming the subjects with a rubber knife and ordering them to attack a victim after being sprayed. Every subject was successful in carrying out the attack despite being sprayed, even when the sprayer retreated and took defensive measures. {The Medical Implications of OC Sprays, pp. 43-45 and 46-48}

BPD's training materials actually reflect this contradictory information. Training and Information Bulletin No. 216 states that "OC is very effective," but goes on to acknowledge that "some people may not submit to arrest or react in a typical fashion to the OC. In some cases, OC actually may increase the volatile behavior. Those that are "goal oriented" may not be affected as totally as others. The "goal oriented" person may be so caught up in achieving his goal, ie., fleeing the police, obtaining a weapon, etc., that he is not affected by OC until sometime later. If this occurs, the officer should be ready to implement necessary alternatives."

The records which the Department has made available to the PRC, as well as one incident which was reported to the PRC by the Department, indicate a serious lack of effectiveness of pepper spray. {Four of the five reported instances of pepper spray use since July 1, 1996.} Of the four incidents reported, three involved a failure of the material to effectively subdue or incapacitate the subject sprayed. On two occasions the suspects continued to struggle violently with the officers; the third suspect was able to flee from the officer confronting him. In all three cases the suspects were finally subdued or apprehended by additional cover officers. A summary of the four reports:

1. Suspect caught breaking into automobile, refuses to surrender to lone officer. Officer sprays suspect, suspect flees and is apprehended by cover officers.

2. Two men wrestling on Shattuck Avenue; one is sprayed because he refuses to let go of the other who is armed with a length of pipe. After being sprayed he releases other man; both are taken into custody.

3. BPD officers respond to suspect knocking on doors and threatening residents. Suspect threatens first officer with a stick from a fence and acts irrationally. Several officers approach suspect who swings stick at them. Officer sprays suspect with pepper spray, but suspect continues to swing stick at the officer. Finally, another officer approaches suspect from behind and tackles him to the ground. Suspect continues to resist while being handcuffed on ground and continues resisting after being handcuffed. Officers employ "The Wrap" to restrain suspect.

4. BPD officers respond to report of drunken male yelling and hitting cars at the Sea Breeze Market. Two officers engage in pursuit on foot, are attacked by dogs but continue chasing suspect. Officers struggle with suspect on dirt embankment but are unable to control or handcuff him. One officer sprays suspect in face from 3.5 to 4 feet. The officer stated that "the OC did not seem to have any effect on {the suspect}." However, the wind blew some of the spray back into the officer's face. The officers continued to wrestle with the suspect until cover officers arrived. It took four to five officers to subdue the suspect and take him into custody.

There are undoubtedly a number of pepper spray incidents where the material was used successfully to control or to assist in controlling suspects. A number of such incidents were reported to both this Task Force and to the PRC by the oral testimony of BPD officers and representatives. However, the records relating to these incidents, which are in the possession of BPD, have not been provided to the Task Force.

In addition, there is no way of determining solely from oral testimony whether the use of mace or another less dangerous material might have effected the same results without the potential for extreme negative consequences inherent in the use of pepper spray.

C. Effectiveness Against Uncontrollable Targets and Danger to Police Officers

The evidence reviewed by the Task Force shows that pepper spray is frequently ineffective in precisely the situations for which it is intended, "situations involving combative, psychotic or under the influence suspects." {BPD Training and Information Bulletin No. 216} The Medical Implications of OC Sprays carefully reviews the available police department studies dealing with effectiveness. The assessment of the Baltimore County Police Department study that cautions against reliance on pepper spray: "with a failure rate of 20% and the statistics showing that OC is least effective on highly aggressive, agitated and intoxicated subjects" is typical. Of the BPD reports available to the Task Force, in three out of four pepper spray was ineffective. Two of the three subjects were combative and either intoxicated or acting irrationally, and required physical restraint by many officers.

The various medical documents reviewed also indicate that alcohol and certain drugs lessen the pain response essential to the effectiveness of pepper spray. The 1994 ACLU report reviewing more than 600 non-fatal pepper spray incidents states that it may be of "extremely limited effectiveness when used on people who are intoxicated on alcohol or stimulants including cocaine, PCP and methamphetamine and people in a state of extreme mental distress or agitation." The 1995 ACLU report reviewing 26 fatalities involving pepper spray found that, "all the victims were acting irrationally when first contacted by police, but pepper spray had a 0% effectiveness rate on them. In virtually every case, victims continued to struggle with officers after they were sprayed, sometimes becoming more combative."

As detailed above, a number of incidents and tests also show pepper spray to be ineffective against a determined attacker or "goal oriented" individual. The Otis Stillwell incident shows that even a determined grandmother can function after being sprayed. The Modern Warrior tests confirmed this conclusion.

The foregoing suggests that police officers should not place a great deal of reliance on pepper spray, and that the use of this weapon may actually serve to escalate rather than control a situation. One reported incident involved an officer responding to a domestic violence call, the officer was beaten to death by an enraged suspect after he was sprayed by the officer. {The Medical Implications of OC Sprays, p. 44} In addition, the officer using the pepper spray or others within its range or downwind may be affected by the spray, potentially reducing the officer's effectiveness and safety. Based on their testimony, many BPD officers have found a false sense of security in pepper spray. Women officers in particular need to realize the serious limitations of this weapon. Adequate cover and training in defensive tactics would prove more reliable tools which are gender and stature neutral.

D. Police Regulations Covering the Use of Pepper Spray

The Berkeley Police Department implemented a series of regulations dealing with officer use of pepper spray that reflect a number of the concerns expressed in this report. However, based on testimony presented to the Task Force, the regulations have been ineffective on a number of occasions. Besides

the Otis Stillwell case, for which Berkeley has already admitted liability, the incident following the July 4, 1996 festivities at the Berkeley waterfront illustrates both that the regulations are not being followed and the potential for liability for improper use. Several witnesses testified that in response to the dangerous and illegal behavior of certain individuals in the large crowd exiting the waterfront area, police attempted to clear the area quickly. People not moving quickly enough were pushed and prodded with batons, and a number of people (in a crowd which included a full range of Berkeley residents from infants to older people) were indiscriminately sprayed. None of the witnesses before the Task Force or anyone else they observed being sprayed was taken into custody or provided with medical care for pepper spray exposure.

On a number of occasions Police Chief Dash Butler and other Departmental representatives have stated that it is not Department policy to use pepper spray for crowd control. However, nowhere in the regulations, Training and Information Bulletin No. 216 dealing with OC procedures, is the use in crowd situations prohibited or addressed in any specific manner (APPENDIX D) Also, there is nothing in the BPD Crowd Management Policies (adopted 04/28/92) that deals with the issue of pepper spray and its regulation. Department guidelines clearly state, however, that, "if OC is used, the suspect must be taken to the designated hospital emergency room by Berkeley Fire Department paramedics for such treatment as the doctor on duty feels necessary" (APPENDIX D).

The Task Force has not been provided with the police reports to allow a complete review of officer adherence to Department policy. In addition, there is some question as to whether the above incident would have been reported anywhere besides the Use of Force reports since no one was taken into custody. Without this information, the Task Force is unable to verify officer compliance with Department regulations or to verify that anyone has ever been disciplined for improper use of this weapon.

III. Liability For Pepper Spray Use

The evidence reviewed by the Task Force shows pepper spray to be an inexact weapon, having a varied and largely unpredictable effect on the people subjected to it. Those who may be seriously injured or killed by pepper spray are not easily distinguishable within the general population. Pepper spray is also considered a less than lethal weapon, and according to FBI instruction materials, falls between Verbal Commands and Physical Control Moves on the use of Force Continuum. {The Use of Oleoresin Capsicum, Dezihan FBI, rev. 11/92} BPD officers testified that they view the use of pepper spray similarly (although sometimes in combination with physical control moves). In addition, the decision to use pepper spray in a given situation is a subjective one on the part of the officer. Both the potential for honest mistake and the temptation to use the material in a proscribed manner (as a crowd control weapon, for example), combined with its potential for inflicting serious injury or death creates a serious liability issue for the City of Berkeley.

The City has already settled one case involving police misuse of pepper spray for $75,000, and the possibility of another case was reported to the Task Force. Neither of these cases involve fatalities, but wrongful death suits have been filed in San Francisco in the deaths of Aaron Williams and Mark Garcia, and lawsuits involving the use of pepper spray are being filed against other cities in the Bay Area and throughout the nation (APPENDIX F). In California, nearly one third of the 26 deaths involving pepper spray (in just the first three years of police use) that were reviewed by the ACLU

have resulted in legal action, with settlements paid out in two cases {ACLU of Southern California, June 1995, The Medical Implications of OC Sprays, p. 30}. In addition, Cap-Stun makers settled a product liability claim in 1994 in Oregon by the widow of the officer beaten to death by a suspect. {Rhodes, Policing by Consent, 8/96}

The possibility of a Berkeley police officer using pepper spray with the intention of controlling a person who is not responding to verbal commands and instead seriously injuring or killing the person puts the City in a position of having to settle or defend lawsuits at the cost of tens to hundreds of thousands of dollars. Berkeley will continue to bear the monetary risk of liability for police use of pepper spray until it can be shown to be safe for its intended use as a non-lethal weapon.

IV. Conclusions

1. Pepper spray is a dangerous and potentially lethal weapon even when it is used according to recommended procedures.

2. It is impossible for officers to identify persons with the types of hidden ailments or disabilities such as asthma, bronchitis, enlarged heart, mental illness, etc..., that are likely to suffer from the most dangerous consequences of pepper spray exposure.

3. Persons who are out of control or under the influence of drugs or alcohol are most likely to be seriously endangered by the negative health effects of pepper spray exposure.

4. Persons who are out of control or under the influence of drugs or alcohol, as well as the determined attacker or "goal oriented" individual, are the least likely to be effectively controlled by the use of pepper spray.

5. Consequently, it is likely that officers may end up using excessive quantities of pepper spray attempting to subdue individuals that are both resistant to its intended effects and particularly sensitive to its dangerous health and life-threatening properties.

6. BPD records, as well as the experiences of other jurisdictions and the reported results of objective testing, have shown that the effectiveness of pepper spray as a non-lethal alternative for use against persons who are out of control, is questionable at best.

7. The characteristics of pepper spray make it a potential danger to the effectiveness and safety of the officer using it.

8. Lack of effectiveness and inherent potential for inflicting serious injury or death make the continued use of pepper spray by the BPD an acute financial liability to the City of Berkeley even if it is used according to BPD policy. Review of the evidence before this Task Force suggests that BPD regulations designed to insure the proper use of pepper spray are not being observed uniformly, increasing the likelihood of a dangerous incident and consequent liability to the City.

For the above reasons, the majority of this Task Force recommends to the Berkeley City Council that pepper spray use by the Berkeley Police Department be ended immediately.

M\S\C (Weisman\Selawsky) That Council end the use of pepper spray by the Berkeley Police Department immediately. Ayes: Bondoc, Halem, Ritchie, Selawsky, Stephens, Weisman; Absent: Betcher, Luten.

V. Civilian Use of Pepper Spray

The questions raised regarding the safety, health consequences and effectiveness of pepper spray as a police tool apply equally to pepper spray as a private defense weapon. Assembly Bill (AB) 830, which went into effect on January 1, 1996, opened the way for general availability of pepper spray and eliminated requirements for training, monitoring, or reporting. The action by the legislature was based in large part on the now discredited FBI study by Special Agent Thomas Ward that found pepper spray to be safe and 100% effective. Ward received $57,000 from a pepper spray company while he was conducting the study, for which he was indicted and convicted.

Continuing to allow private unrestricted use of pepper spray - a product that can cause death or serious health problems - as a first line of defense raises serious questions. Chief Butler provided persuasive testimony in this regard. Medical attention is not readily available to victims of the spray in non-police encounters. Additionally, the fact that the product is unreliable in its ability to stop an attacker provides people with a false sense of security, and may in fact lead to more dire consequences, particularly in situations like domestic violence, where the attacker is enraged and "goal oriented".

The easy availability of pepper spray, in addition to concerns over its intended use, has created a new set of problems as a result of accidents, misuse and abuse, and has generally raised the level of violence throughout the community. News stories appear weekly detailing incidents where pepper spray has sent dozens of people to the hospital because of an accidental release or a school child's prank or a malicious misuse in a crowded public place. This alone has serious consequences for the health of our community.

M\S\C (Ritchie, Weisman) That Council take the following steps regarding the continued use and availability of pepper spray as a private defense weapon:

That Council take whatever steps necessary to encourage the legislature to repeal AB 830 and to remove pepper spray from use by private citizens until credible independent information regarding its safety and reliability as a defensive weapon can be established.

That Council take the following local interim measures to protect the health of the community:

1. Direct the City Attorney to investigate the possibility of instituting a local ban on the sale of pepper spray products with the City of Berkeley. In light of recent rulings regarding Saturday Night Specials and local initiatives to limit the availability of "junk guns", the City Attorney should be more open to pursuing legal options.

2. If a ban is not possible, stringent restrictions should be developed for over-the-counter sales of pepper spray, that would include the following:

   - Proper age identification for purchase.

- Develop warning labels for pepper spray products that inform the purchaser of the possible health consequences associated with exposure, and of the unreliability of the products in stopping a determined attacker, or someone under the influence of alcohol or drugs. The label should also encourage purchasers to seek training for the safest and most effective use of the product.

- Direct the City Attorney to investigate the feasibility of retail licensing for the sale of pepper spray products, and of raising the minimum age for purchase to 18 years.

3. That Council direct the City Attorney to develop aggressive measures to hold pepper spray manufacturers accountable and liable for misuse of their products.

4. That Council communicate to neighboring communities the findings of this Task Force on the use of pepper spray in Berkeley, because of our concerns for the overall health of the broader community, and advise them to set up their own task forces to look into the issues.

Ayes: Unanimous, Absent: Betcher, Luten.

FINANCIAL IMPACT:

None.

CONTACT PERSON:

Richard Bondoc, Chairperson, Task Force on Pepper Spray, 548-4270
Manuel Hector Jr., Secretary, Task Force on Pepper Spray, 644-6080

Approved by:

Richard Bondoc (MH)
Richard Bondoc, Chairperson
Task Force on Pepper Spray

Attachments

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March 22, 1996

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Statement of Dr. Woodhall Stopford, MD, MSPH, concerning the pathophysiology of capsaicin and risks associated with oleoresin capsicum exposure

Oleoresin capsicum (OC) is an extract of pepper plants of the genus Capsicum. This extract is used as the active component of OC spray. OC is a complex mixture of capsacinoids, 80-90% being capsaicin and dihydrocapsaicin, the most potent of the homologs in this mixture.[1] Oleoresin capsicum is used as the principle active ingredient in "pepper spray". The content of capsaicinoids in OC extracts used in these sprays is quite variable, ranging from 1.2 to 12.6%.[2] Concentrations of OC extract in pepper sprays range from 5-10%.

Individuals are exposed to OC through skin contact, eye contact and inhalation. Once inhaled, OC in airways can be expectorated and ingested. Some individuals, such as trainers, may have repetitive, low level exposure to capsacinoids with OC spray training of correction officers.

Chronic Effects of Capsaicin and Capsaicinoids

• Cancer: In human populations who use peppers routinely in their diet, there is an increased incidence of gastric cancer.[3-6] with risks as high as 5 folder greater than in individuals not using peppers in their diets. Experimental studies are also suggestive: in mice treated with capsaicinoids by mouth, there is a 10% incidence of duodenal cancer vs 0% in controls.[7] Capsaicin is mutagenic as well.[8]

• Loss of vision: Systemic administration of capsaicin is associated with the degeneration of trigeminal nerve fibers in the cornea with associated neuroparalytic keratitis.[9] This keratitis is manifested by corneal edema, ulceration and opacity. Topical application does not result in opacity but does eliminate the blink reflex for up to 5 days after dosing.[10]

• Brain and nerve damage: Systemic administration of capsaicin specifically damages non-myelinated sensory nerves and nerve endings. This occurs in the brain, spinal cord, retina, lungs, and heart.[10-12]. There appears to be a human equivalent of this disorder. Individuals with an inherited disorder, familial dysautonomia, have a severe peripheral sensory neuropathy and skin changes associated with marked depletion of substance P.[10] Substance P is a peptide that is depleted with systemic administration of capsaicin.

• Liver damage: Chronic oral administration of capsaicinoids to hamsters is associated with liver fibrosis, necrosis and cirrhosis.[13] There is also an increased risk of liver cirrhosis in individuals

who consume a lot of peppers in their diets.[14]

• Peptic ulcer disease: There is an increased incidence of stomach ulcers after chronic ingestion of capsaicinoids and peppers in both humans and experimental animals.[14]

• Kidney damage: Glomerular damage of the kidneys seen after chronic oral administration of capsaicinoids to hamsters.[13]

• Airway reactivity and chronic airways disease: Capsaicin inhalation results in both immediate bronchoconstriction as well as delayed airway inflammation. Capsaicin stimulates the release of neuromediators including substance P. At non-bronchoconstictive doses, substance P potentiates bronchospasm induced by acetylcholine, a measure of airway reactivity.[17] This may be secondary to the flammatory activity of substance P with associated airway edema and recruitment of inflammatory cells and eosinophils. Capsaicin inhalation at bronchoconstrictive doses results in airway reactivity that persists at least to the next day.[18] Exposure to neuromediators released by capsaicin result in airway reactivity that persists for at least 4 weeks.[15] This effect is similar to what seen after viral chest infections or exposure to ozone, irritants or cigarette smoke.

Among chili grinders exposed chronically to capsaicinoids, 44% develop chronic respiratory symptoms.[15] Chilli grinders exposed to Capsicum develop bronchoconstriction.[43] Paprika workers exposed to capsaicinoids can develop severe chronic bronchitis and bronchiectasis.[16] This risk disappears with substitution of a pepper plant with a low content of capsaicin in the production of paprika.

Acute Effects of Capsaicin and Capsaicinoids

• Neurogenic inflammation of skin: Application of capsaicin to the skin results in redness and pain. With repeated doses of capsaicin to the skin or mucous membranes seconds or minutes apart, the response is exaggerated.[19]

• Neurogenic inflammation of nose: Capsaicin releases substance P from nasal mucosa with an associated amplification of inflammation and hyperresponsiveness.[20] Up to 59% of workers exposed to capsaicinoids complain of rhinorrhea.[21]

• Cough: Exposure to aerosols of low dose capsaicin stimulates the cough reflex in humans.[22] 59% of workers exposed to capsaicinoids complain of cough, even at exposures of $< 1 \mu g/m^3$.[21]

• Bronchospasm: Low dose capsaicin exposure to humans is associated with reflexive bronchoconstriction with an average of 50% reduction of conductance in asthmatics and 30% in normals within seconds of exposure.[23] Capsaicin causes strong, long-lasting bronchospasm when directly applied to human bronchial preparations.[24,25]

• Pulmonary edema: Substance P released from nerve fibers by capsaicin stimulates mucus secretion and increases vascular permeability in the lungs.[26] . With a parainfluenza infection, there is a 3-8 fold increase in neurogenic inflammation of the airways after capsaicin inhalation.[27] Respiratory infections with mycoplasma pulmonis cause a 30 fold increase in

neurogenic plasma extravasation. This effect can last at least 4 weeks.[28]

• Hypertension: Inhalation of capsaicin associated with hypertension, similar to the effect seen after ammonia inhalation.[29]

Risks Associated with OC Spray

• Eye damage: In humans, OC spray is associated with severe twitching of the eyes, stinging, lacrimation and spasmodic closing of the lids.[30] 1% capsaicin application to cornea results in neurogenic inflammation and loss of reaction to chemical and mechanical stimuli for at least 1 week.[10,24] The loss of the superficial sensation of the cornea and this blink reflex can result in corneal abrasions with contact lens and abrasions if foreign bodies get into the eye. There would be an increased risk of foreign bodies or chemical splashes getting into the eyes and being ignored, even if they were causing inflammation.

• Skin effects: In humans, OC spray contact is associated with pain, redness and, in some cases, blistering of the skin.[31] Capsaicin exposure to skin enhances allergic sensitization and allergic dermatitis.[32] Capsaicin exposure skin can result in loss of sensitivity of skin to heat or chemically-induced pain.[24] Loss of these protective reflexes would could increase the risk of skin burns or increase their severity if a burned individual does not immediately ice down or wash off.

• Laryngospasm and respiratory Arrest: Asthmatics are more sensitive to the bronchoconstrictive effects of capsaicin than normals with up to a 40% decrease in air flow.[33] In addition to the precipitation of an acute asthmatic attack, OC spray may increase the risk of respiratory arrest. Respiratory arrest was reported in two asthmatics and one individual with chronic bronchitis after OC spray exposure during an arrest[34] and in another individual who was sprayed repeatedly at the time he had a respiratory tract infection.[30] This effect may be secondary to laryngospasm. Direct contact of vocal cords to capsaicinoids associated with laryngospasm lasting 45 seconds.[35]. Laryngospasm and respiratory arrest occurred after intentional OC spray inhalation by in a child.[36]

• Pulmonary edema: Pulmonary edema occurred after intentional OC exposure in a child.[36] Pulmonary edema was also noted in an asthmatic who had respiratory difficulty and a respiratory arrest after being sprayed with OC during an arrest.[34] Risk of pulmonary edema increases with prior infection with parainfluenza virus or Mycoplasma[27,28] with up to a 60 fold increase in vascular permeability seen with capsaicin treatment after such infections.[44]

• Airway Reactivity and Bronchospasm: Individuals who have prior airway inflammation from airway infections, smoking, asthma, or irritant exposures, may be particularly susceptible to bronchospasm associated with inhaling OC spray.[39,40] With prior irritant exposure and associated airway inflammation, you can see bronchospasm at doses of capsaicin not associated with bronchospasm in controls.[37] Chest infections with parainfluenza virus increase the responsiveness of airway smooth muscle to capsaicin by a factor of 3.[26] Eosinophil recruitment in airways is seen both with asthma and capsaicin treatment[45]: asthmatics may be at particular risk from OC spray inhalation. In addition capsaicin administration is associated with the induction of hyperreactivity of the airways.[17] Exposed individuals would be at risk of asthma attacks with further exposure to OC spray, irritant exposures or chest infections.

• Hypertensive crisis: Acute elevations of blood pressure, such as seen with capsaicin inhalation, may cause headaches and are associated with an increased risk of stroke and heart attacks.

• Hypothermia: Capsaicin and capsicum powerfully and locally stimulate heat receptors and cause reflex sweating and vasodilation, effects which may contribute to a risk of hypothermia.[14,42] Such effects may increase the risk of hypothermia with cold water decontamination on cold days. Low systemic doses of capsaicin have been associated with a rapid decrease in body temperature by 6° C.[14]

Adverse effects associated with training of correction officers in North Carolina by spraying with oleoresin capsicum spray

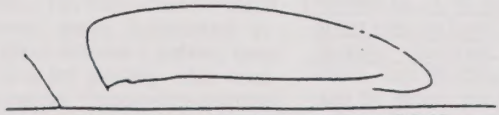
OC spray exposure to correction officers has been associated with an number of adverse effects sufficiently severe to require medical attention(appendix) including eye irritation, eye burns and abrasions, shortness of breath, asthma attacks, nose irritation, acute hypertension, severe headaches, chest pain and loss of consciousness. The incidence of effects that were persistent or sufficiently severe to require medical attention was 5% among 187 officers undergoing training. Particularly troublesome adverse effects included those that persisted for more than 1 week (8 of 61 individuals who were seen for medical problems) and which were potentially life threatening including bronchospasm and acute hypertension to levels of 180/110 or greater. Often the first line of treatment was with injections of epinephrine, a practice that would aggravate hypertension brought on by the OC spray itself.

Recommended protection to decrease risk of adverse effects associated with OC spray training

Both federal OSHA as well as two state occupational safety administrations recommend either no exposure to OC spray during training or appropriate protection to include:

- eye protection (face shield or goggles)
- medical screening of those who may be susceptible to adverse effects of OC spray
- training in compliance with OSHA's Hazard Communication Standard

Individuals with pre-exiting hypertension, asthma, eye conditions, chest infections or airway reactivity would be more susceptible to adverse effects after being exposed to OC spray and should be excluded from exposure situations. A face shield would also decrease the risk of adverse respiratory effects from inhaling OC spray.



Woodhall Stopford, MD, MSPH

TUESDAY, MAY 20, 1997 HEALTH

Increase in Asthma Puzzles Scientists

Links sought to secondhand smoke, urban violence

By David Perlman
Chronicle Science Editor

Researchers seeking to explain the puzzling increase in asthma rates are focusing on a variety of causes, including secondhand smoke, genetic susceptibility and the psychological stress of exposure to violence in America's inner cities.

The number of deaths per year from the disease among adults has nearly doubled in the past 20 years. And among children, asthma now ranks as the leading cause of serious chronic illness. It is the most common ailment that sends youngsters to the hospital.

Asthma and its problems were a major topic of discussion yesterday in San Francisco, where 15,000 physicians and health care workers were attending an international conference on lung disease sponsored by the American Lung Association and the American Thoracic Society.

The prevalence and severity of asthma among urban schoolchildren is probably much higher than surveys have shown, according to Dr. Salvatore Mangione of Allegheny University in Philadelphia, who headed a long-term study of the disease among more than 1,000 pupils in two large inner-city schools.

Mangione's study revealed that 35 to 40 percent of the Philadelphia schoolchildren had reported symptoms of asthma — a far higher number than the 10 percent that previous health surveys had indicated. And only 10 percent of those cases were known to the staffs of the schools, Mangione said, even though the youngsters regularly missed significantly more school days due to illness than the average.

Nearly half the children in the survey were unaware that they had asthma, Mangione's survey showed, and their symptoms were much worse than the average asthmatic's.

In another study of inner-city schoolchildren, a team from the Harvard University medical school found that frequent exposure to violence in their environment posed a "unique and extreme stress" that triggered asthma attacks.

Dr. Rosalind J. Wright of Harvard's Brigham and Women's Hospital, reported preliminary findings from a study of nearly 800 children whom the researchers have been studying since birth.

More than 40 percent of the children had been exposed to some form of violence, such as gunshots or stabbings, Wright said, and the children were three times more likely to receive a diagnosis of asthma than children living outside the violence and poverty that marks many of America's cities.

In a study focusing on heredity's role in asthma, researchers from the University of Helsinki in Finland examined the disease histories of more than 3,300 iden twins and 7,200 fraternal twins. cording to Dr. Maija Rasanen, t Finnish group's leader, asthma cases differed significantly between the two groups of twins, and genetic factors most probably accounted for more than 50 percent of the difference that made asthma more common among the identical twins.

Cigarettes have long been indicted as a major cause of many respiratory diseases, and in Italy, a survey of more than 18,500 6- and 7-year-old children has shown new evidence of the effect of smoking on asthma.

The Italian government researchers, headed by Dr. Nera Agabiti, found that the risk of developing asthma increased significantly when either or both parents were smokers.

Pepper Spray Studied In Inmate's Death

San Quentin prisoner had enlarged heart

By Erik Ingram
Chronicle North Bay Bureau

The death of a San Quentin inmate remained a mystery yesterday as preliminary autopsy results showed no clear reason why he died in the prison infirmary, where he was taken Sunday after being pepper-sprayed and forcibly removed from his cell by guards.

Assistant Marin County Coroner Ken Holmes said no final determination in the death of Sammy Marshall, 51, will be made until tissue and toxicology tests are completed in about two weeks.

"At this point, we're not ruling out a natural death," Holmes said.

BY ASSOCIATED PRESS

Tommy Reed (top) and Timothy Obler escaped from San Quentin

Preliminary autopsy findings, however, showed Marshall suffered from cardiomegaly, an enlarged heart. Some studies have suggested that pepper spray may be a serious complicating factor when used on people with heart disease.

Holmes said forensic pathologist John Holloway found minor scrapes on Marshall's body. Holloway found no apparent sign of a heart attack but will explore that possibility with microscopic examinations of heart tissue, Holmes added.

Many opponents of pepper spray, such as San Francisco attorney Van Jones of the Policewatch legal affairs agency, say the spray should be banned until comprehensive studies are performed on its effects on people with health problems.

"We are very concerned about the use of an untested chemical weapon before any viable tests have been done to show it's not lethal," Jones said.

During their investigation, coroner Ervin Jindrich and Holloway will explore what role, if any, pepper spray played in the death, Holmes said. Marin County has never had a death concurrent with pepper spraying before.

"They're going to be doing some research and contacting (other medical examiners)," Holmes said. "There's not a lot in the medical journals about it."

Marshall, incarcerated at San Quentin since 1988 for murdering a woman in Los Angeles, died Sunday after he barricaded himself inside his Adjustment Center cell by wrapping torn bed sheets around his door and shielding himself with a mattress.

According to Lieutenant Joy Macfarlane, a prison spokeswoman, Marshall was pepper sprayed after refusing to leave his cell. She said no other details will be released until the investigation is complete.

Others familiar with the case, however, said it appears a "wrestling match" took place between Marshall and the guards before he was removed from his cell and taken to the infirmary. He was pronounced dead at 12:50 p.m.

Macfarlane said that the use of pepper spray is standard in such cases and that there was no indication of wrongdoing by any correctional officer.

"Pepper spray is not a pleasant experience," she said, but its use in similar circumstances in the past has proved successful in reducing injuries to staff and inmates.

She said the case is currently being reviewed by the Department of Corrections' investigative branch, the Special Services Unit.

Use of pepper spray by law enforcement has been controversial for several years. Supporters argue it gives officers a potent, nonlethal tool for dealing with combative people. Opponents counter it can amount to deadly force when used against some individuals who are high on drugs or who suffer certain pre-existing health conditions.

Alan Parachini of the ACLU of Southern California, which studied deaths related to pepper spray, said his organization has tried to take a middle course.

"It should never have been allowed into the market place with the lack of testing, but given the reality (that it was), there is no question that it is an effective police tool against a certain population of violent offenders," Parachini said. "In some settings, its use can be preferable to a night stick or a gun."

A 1995 study by his agency into the 26 known deaths among people sprayed with pepper found several common denominators.

Alcohol and drugs were involved in 24 of the 26 cases. The other two suffered from acute psychiatric disorders. In 14 of the 26 cases, the victims had been hog tied by police, making them more susceptible to positional asphyxiation.

A majority (61 percent) of the victims also showed evidence of serious underlying heart or respiratory disease. Two of the victims were identified as asthmatic

Parachini said seven of victims suffered from en hearts, like Marshall.

"We concede that the nu are small and open to disc about their statistical val Parachini said, "but we think are enough to get some que asked and answered."

Meanwhile, authorities c ued to search yesterday for t mates who escaped from Quentin's minimum-sec "ranch" over the weekend two escapees are identifie Tommy Allen Reed, 21, and thy Obler, 28.

San Quentin officials b the two men may have burr under or climbed over a chai fence around a dormitory ho 200 nonviolent prisoners.

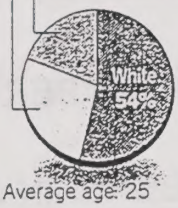
DEATHS LINKED TO PEPPER SPRAY

In the first three years of legal police use of pepper spray, at least 26 people died after being sprayed. The American Civil Liberties Union stu the circumstances of those deaths, with these findings:

■ **Demographic breakdown**

Latino 27%

African American 19%

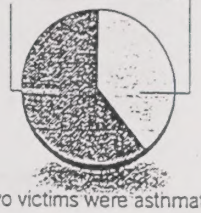


Average age: 25

■ **Health background**

Evidence of heart/respiratory disease 61%

No evidence 39%



Two victims were asthmatics

Drugs and/or alcohol involved in of the 26 cases

■ **Suspect activity and apprehension**

All 26 victims were acting irrationally when approached by police, but n was subdued solely by pepper spray.

Half the victims were held by a "hog-tie" restraint just after being sprayed and just before dying. Restraint techniques contributed to cause of death in half of the cases.

OTHER FACTS

■ Between October 1992 and May 31, 1995, California law enforceme officials used pepper spray on suspects nearly 16,000 times — an ave age of 24 times a day statewide.

■ The fatality total suggests that one person dies after being pepper sprayed for every 600 times the spray is used by police.

Note: The ACLU study examined deaths between Jan. 1, 1993 and June 1, 199 The death of Aaron Williams in San Francisco occurred on June 4, 1995, just aft the study period ended.

Source: American Civil Liberties Union of Southern California

Chronicle

TRAINING AND INFORMATION BULLETIN

DATE: SEPTEMBER 25, 1995 **NUMBER:** 216 (revised)

SUBJECT: OLEORESIN CAPSICUM (OC) SPRAY

Frequently, officers are called upon to handle situations involving combative, psychotic, and under the influence suspects. Although, these situations may become extremely volatile, the use of a firearm is rarely justified. The baton is readily available, but its use can result in combat which subjects both the officer and suspect to physical injury.

The product, Oleoresin Capsicum (OC) spray has proven to be effective when used on combative, psychotic, and under the influence suspects. Although the baton may still be required in some circumstances, proper use of an aerosol dispenser (OC) should enable individual officers to quickly and safely subdue most individuals.

OC should be used only in situations where a weapon is absolutely required to control violent behavior, and only as an alternative to a more extreme application of force. The term "violent" as used above and in Police Regulation 321 means someone who is capable of and intent upon injuring an officer or others. It should never be used under any circumstances in an indiscriminate or punitive manner. OC is a defensive weapon. There are a few points that should be considered:

1. OC utilizes cayenne pepper in a solvent solution, under pressure and causes swelling to the mucus membranes. This can cause breathing difficulties. These breathing difficulties will be more pronounced for those with asthmatic conditions. Our policy requires medical attention for individuals who have been exposed to OC to flush the irritants out of their eyes.

2. OC is very effective. State of California surveys among California Police Departments have shown it effective in 85% of cases. Some people may not submit to arrest or react in a typical fashion to the OC. In some cases, OC actually may increase the volatile behavior. Those that are "goal oriented" may not be affected as totally as others. The "goal oriented" person may be so caught up in achieving his goal, ie., fleeing the police, obtaining a weapon, etc., that he is not affected by the OC until sometime later. If this occurs, the officer should be ready to implement necessary alternatives.

3. Officers are cautioned to use OC only when it is practical and effective to do so.

DEPARTMENTAL POLICY

Departmental policy concerning the use of the aerosol dispenser is listed in Police Regulation 321: "Employees shall use the aerosol gas dispenser in the performance of police duty only when necessary and after other reasonable means to control a violent person have failed. Every employee using the dispenser shall file an oral report with one's supervisor as soon as practical, except as delineated in General Order U-2." The supervisor shall complete the Use of Force form as well. Employees shall also complete a California State Department of Justice Oleoresin Capsicum (OC) Application Report. This report gets submitted along with the Use of Force form. Copies of both shall be forwarded to the Departmental Chemical Agents Instructors.

Other guidelines are listed below:

1. OC will only be used after all other reasonable efforts to control a violent person have failed.

2. If OC is used, the areas of the body exposed to the spray must be flushed with water as quickly as possible. The officer's report shall also include information concerning the length of time between use of OC and flushing with water. Water can be obtained from a source (faucet, drinking fountain) and then splashed in the person's face and on the person's contaminated skin. Direct use of water from a hose shall not be used due to unknown pressure and contaminants within the hose. The suspect will be continuously monitored for any breathing difficulties.

3. If OC is used, the suspect must be taken to the designated hospital emergency room by BFD paramedics for such treatment as the doctor on duty feels necessary.

THE EFFECTS OF OLEORESIN CAPSICUM

Oleoresin Capsicum (OC), unlike CN or CS agents, is a highly concentrated form of peppers that affects the mucus membranes of humans and animals. OC, when applied to the face, typically causes the following: swelling of the mucus membranes, involuntary closing of the eyes, gagging, coughing, shortness of breath, and an intense feeling of burning on the exposed areas.

The chief advantage of OC is that it is an additional effective tool when used against combative persons with a reduced sensitivity to pain. It is also effective against vicious animals. Pain and burning symptoms are temporary, although they may last up to 45 minutes if left untreated. Breathing difficulties should subside within one or two minutes. The suspect should be continuously monitored for breathing difficulties.

OC spray will work effectively in most cases. Unlike chemical mace, OC has been known to work effectively on suspects under the influence of such drugs as PCP. However, during any attack, be prepared to step to one side after spraying the suspect, and spray the attacker again, if necessary. No more than two , one-half second bursts for any one suspect.

APPLICATION

OC has been approved for use in California by the Department of Justice. For maximum effectiveness, a targeted suspect should be at a distance of not less that six feet or more than ten feet away. OC is not recommended for use in distances of less than six feet for self-protection reasons. Furthermore, OC does not become activated in less than two feet. There is a slight chance of hydro-injection, resulting in damage to the suspect's eyes, if OC is sprayed in the eyes at a distance of two feet or less.

In order to provide the best effects, OC should be sprayed in the combative suspect's face in the area of the forehead to the mouth. Spraying the suspect below the face will not cause the desired effect.

Normal application shall be a one-half second burst. No more than two, one-half second bursts to the face shall be used. If more OC is used, you will run the risk of "washing" the OC from the suspect's face causing little or no reaction, and increasing the probability of cross contamination with fellow officers. Unlike chemical mace, which is released as a mist, and vaporizes when it comes in contact with the skin, OC is released in a narrow stream. Rather than vaporizing, the OC carrier drys and allows the irritating resin to attach to the skin, eyes, etc.

The following are considerations that officers using OC must keep in mind:

1. Use caution if other officers are engaged physically with the suspect.

2. Use care during windy conditions. Cross contamination may occur.

3. Use caution around an open flame. OC, approved by the Berkeley Police Department, contains 5% alcohol in the carrier solution.

4. Be sure to wash your hands if you touch the suspect.

5. The canister should be shaken once a month to ensure proper mixture. It should also be shaken just prior to use, if possible.

6. Do not use around children as their respiratory systems have not developed.

7. Officers should recognize the limitations of non-lethal OC, especially in situations where the attacker is armed.

8. Do not use OC against a suspect operating a motor vehicle.

9. Keep the canister hidden from the suspect until ready to use.

10. Always hold the canister in your off hand.

11. The FAA forbids the carrying of OC on any aircraft.

12. Carrying OC is mandatory for all sworn, uniformed personnel.

A. Personnel shall successfully complete the Department training on OC prior to carrying it.

DECONTAMINATION

Those experiencing OC for the first time will normally be in a state of panic, not knowing what is happening to them. They should be verbally assured of the temporary nature of their discomfort. Although it might be difficult to accomplish, they should be encouraged to relax and to try to breath normally.

Physical relief can be accomplished by fresh air and the rinsing and flushing of the eye with cool water. Soap and water will expedite the removal of OC from the general skin areas. After initial decontamination measures have begun, the suspect shall be transported to the designated hospital emergency room for an examination of the affected areas.

OC is biodegradable and does not require any special decontamination measures when used in an enclosed area. Normal ventilation should remove it from an enclosed area within 45 minutes.

LAWS AND REGULATIONS

Most of the laws pertaining to chemical aerosol containers are in the California Penal Code, sections 12400 through 12458. Listed below are sections pertinent to this training bulletin:

12403 PC: This section provides that police officers shall not be prohibited from purchasing, transporting, possessing, or using certified tear gas weapons, if such weapons have been certified as acceptable under 12450-12458 PC, and if such person has satisfactorily completed a course of instruction approved by P.O.S.T. These weapons are to be used for official use in the discharge of duties.

12420 PC: This section provides that any person, other than a police officer and a licensed OC distributor, who sells, offers to sell, possesses or transports OC, is guilty of a misdemeanor. HOWEVER, NEW LEGISLATION WILL ALLOW CIVILIAN POSSESSION ON 1-1-96.

BERKELEY POLICE DEPARTMENT REGULATION 321: Use of–When Permitted. Employees shall use the aerosol gas dispenser in the performance of police duty only when necessary and after other reasonable efforts to control a violent person have failed.

BERKELEY POLICE DEPARTMENT GENERAL ORDER U-2, 10(B) (3): Reporting the Use of Force. A Use of Force Report shall be completed by a supervisor in the following situations: when non-lethal weapons (OC /batons) are used on a person.

ADDITIONAL

Sudden in-custody deaths have recently come to light. They can occur for a variety of reasons. Please see Training and Information Bulletin #234 (8-23-95), for additional important information on this subject.

D. E. BUTLER
Chief of Police

SOLANO SCENE

DAILY REPUBLIC — Tuesday, April 1, 1997 A3

Local man seeking pepper-spray restrictions

By Andrew LaMar
DAILY REPUBLIC

FAIRFIELD — The brother of a man who died last year in police custody after being pepper sprayed will ask the City Council tonight to temporarily ban police use of the chemical.

Dan Parkinson said he's following the move of a Berkeley citizen's commission, which has asked the Berkeley City Council to place a moratorium on pepper spray's usage in that city.

"I think this is an issue that concerns the city, potentially the financial aspects of the city," Parkinson said Monday. Fairfield is self-insured and is liable for injuries caused by pepper spray, he said.

Parkinson and his family filed a wrongful-death suit against Fairfield after James Parkinson, 25, died last June while being apprehended by police. Dan Parkinson alleged police sprayed the chemical into his brother's eyes and mouth, violating the manufacturer's directions for use.

An autopsy revealed James Parkinson died of sudden cardiac arrest.

Police nationwide use the spray as a means of subduing unruly individuals. Fairfield police rarely use the chemical, according to Larry Walker, the assistant police chief.

"Our position has been all along there aren't conclusive studies we're aware of that (pepper spray) has killed anyone. So absence that proof, there has been no reason to cease the use of it," Walker said. He called the chemical an effective nonlethal tool.

Mayor Chuck Hammond and Councilwoman Karin MacMillan both said they're aware of the controversy concerning pepper spray but would reserve judgment until they had more information.

"With everyone coming toward us with these kinds of issues, I think (a study) is something we have to look at," Hammond said.

The Berkeley Pepper Spray Task Force made the recommendation based on a recent legal settlement and pending litigation, said Mike Sherman, a task force member. The Berkeley City Council is expected to consider the matter in April.

"It is a very controversial drug and has been discussed and banned (in places) worldwide," Sherman said.

The task force hopes to complete a report for the council by June. The committee requested the moratorium after learning the city recently paid a woman $75,000 to settle a lawsuit blaming police for causing respiratory and eye injuries with the spray. A similar lawsuit involving another case has just been filed.

Pepper spray has contributed to the deaths of at least 32 Californians, Sherman said.

In July 1995, the American Civil Liberties Union issued a report claiming pepper spray had caused 26 deaths statewide.

Action for Police Accountability, a volunteer group based in San Francisco, has lobbied against the use of pepper spray. Separate studies conducted by the U.S. Army, a University of North Carolina professor and the California Environmental Protection Agency all concluded the chemical is a health risk, said Jo Hirschmann, an organizer for the group.

"Police departments were led to believe pepper spray is not lethal, that it comes below the use of guns, but that is absolutely not true," Hirschmann said.

Appendix E

SAN FRANCISCO EXAMINER,

Dead man's kin sue Fairfield cops

Say Taser blasts were overreaction to psychotic episode

By Jim Herron Zamora
OF THE EXAMINER STAFF

The family of a mentally ill 25-year-old man who was found wandering naked near a swimming pool and later died in Fairfield police custody has filed a federal lawsuit accusing authorities of violating his civil rights.

The suit, filed in U.S. District Court in Sacramento Friday, accuses Fairfield police of improperly using pepper spray and a Taser gun last June 8 to subdue James Parkinson, a schizophrenic man who was having a psychotic episode.

Fairfield police and city officials had not yet reviewed the suit Friday and declined to comment. In earlier published reports, officials have denied wrongdoing in the case.

Fairfield police have been the subject of another recent controversy. In December, they Tasered an off-duty Oakland police officer, a black man, who had accidentally locked himself out of his Fairfield home.

"We believe that the police there are out of control," said Nanci Clarence, the San Francisco attorney who filed the Parkinson case.

"They used a degree of force on a man that was clearly of no threat . . . " she said. "Any responsible police department knows that neither pepper sprays nor Taser guns are designed for use against individuals suffering psychotic episodes, since the effects of the two weapons become greatly enhanced in such cases."

At the time of his death, Parkinson was living at Stargate, a mental health center run by Solano County. The suit alleges that a Stargate counselor saw Parkinson run away from the center but waited 20 minutes before calling police. By then, police had already been summoned by others.

Several blocks from Stargate, Fairfield police encountered Parkinson running around "nude, unarmed and obviously psychotic," according to the suit.

To restrain him, officers sprayed him in the face with pepper spray and fired numerous electric Taser darts at him until he collapsed, the suit alleges. On the ground, Parkinson reportedly turned blue from lack of oxygen and died while being treated by paramedics, the suit alleges.

Clarence alleged that the eight Fairfield officers had decided not to try tackling Parkinson because he had some blood on his body, and "they left their (rubber) gloves back in the car."

Suit Filed on In-Custody Death of Schizophrenic

Fairfield — The father of a schizophrenic man who died in police custody after breaking out of a home for the mentally ill has filed a suit alleging civil rights violations.

James Parkinson, 25, was in police custody for breaking windows at two homes and running naked through an apartment complex after escaping a Solano County facility last June. After a 10-minute struggle, officers handcuffed Parkinson and strapped him to a gurney, police said.

The suit said officers blasted Parkinson in the face with pepper spray and repeatedly shot him using an electric Taser gun. Parkinson was knocked to the ground and held face-down, eventually dying from lack of oxygen, said the suit filed against the city of Fairfield and Solano County.

Parkinson was pronounced dead at NorthBay Medical Center after paramedics failed to revive him, police said.

Fairfield police Lieutenant Terry Thomas declined comment on the lawsuit.

Nanci Clarence, a lawyer for the family said that pepper spray and a stun gun should not have been used against Parkinson, who was unarmed and suffering a psychotic episode.

Pranks by Cops End In Internal Investigation

Fairfield — A series of pranks within the Fairfield police department — including one where an on-duty cop was issued a fake subpoena and drove three hours for a bogus hearing — has triggered an internal investigation.

"Police officers are always playing jokes on one another, but this one got out of hand," said Fairfield police Lieutenant Terry Thomas, a department spokesman.

Sergeant Len Cimino, a 22-year veteran of the department, may face discipline for sending officer Dale Golez to the Santa Rita Jail for a phony parole hearing. The prank was the last in a series of tricks played by and against several officers, including the police chief and assistant chief.

…thers fly over …ng. (Page 15)

WORTH & WONDER: Spotlight on local playwrights. (Page 19)

Canned Heat

Sonoma County Independent 5/15/97

Did police pepper spray kill Dustin Harley Clark?

BY GREG CAHILL

HOT-WIRED to his crackling nervous system by cheap crank and two hits of low-grade blotter acid, Dustin Harley Clark could feel his demons closing in. It was shortly after 3 o'clock in the morning on Sept. 6 when neighbors in the Roseland district of Santa Rosa first phoned 911 to report a white, blonde-haired male stripping off his clothing, behaving bizarrely, and howling in the night.

Two patrol units from the Sonoma County Sheriff's Department responded to the calls. Deputy Joe Quinn found Clark, 23, standing in the roadway on Tara Drive. Clark was wild-eyed, stark naked, screaming that he was God, and insisting that he was being chased by the devil. Strung out from a "hard run" of methamphetamines, Clark had complained a couple of days earlier to his sister—at whose house he was staying in the area—that he feared for his sanity.

Shortly after midnight, Clark and a friend dropped a couple of hits of LSD.

It took just 20 minutes for Clark's demons to emerge.

Squaring off on Tara Drive, Quinn ordered Clark to lie on the ground. According to police reports, Clark stopped in front of Quinn's patrol car, flailing his arms and yelling incoherently. Clark lunged at the deputy then turned and ran. Quinn hopped in his car and

Continued on page 7

Heat

continued from cover

gave chase, followed closely by a K-9 unit driven by Deputy Dave Smith. At the intersection of Schlee Way and Tara Drive, Clark stopped and turned to face the deputies. Once again Quinn ordered Clark to lie down. Instead, Clark sat on the pavement, his mind reeling from powerful hallucinatory drugs and adrenaline.

Quinn pulled a canister of pepper spray from his utility belt and ordered Clark to lie down as Smith let his leashed police dog out of the back seat of his patrol car. Clark saw the dog, panicked, shrieked, and pushed himself up off the ground. Quinn discharged the pepper spray, hitting Clark squarely in the face. Clark wiped the hot fluid from his eyes and charged Quinn in a rage, kneeing him in the right thigh.

Naked and drenched in sweat, Clark wiggled from Quinn's grasp. He charged the police dog and turned again on Quinn, who struck a couple of "glancing blows" to the suspect with a service flashlight, hitting Clark on the right shoulder and left side of the head. Clark broke away and turned to face the deputies again. Smith unleashed his snarling dog, which bit Clark several times.

Finally, Quinn and Smith wrestled Clark to the ground, lying on top of him. Quinn put Clark in an "arm bar" restraint; Smith bent Clark's legs back in a hog-tie position. Clark fought back violently and then suddenly calmed down. That's when Quinn noticed that Clark's face had turned blue as he went into cardiac arrest. Paramedics arrived within moments and attempted to resuscitate Clark, who already had slipped into a coma.

Six hours later, doctors at Memorial Hospital pronounced Clark dead.

THE SANTA ROSA Police Department investigated the case, a customary procedure when another law enforcement agency is involved in the death of a suspect. The SRPD hired the San Francisco medical examiner to perform the autopsy on Clark's remains. The conclusion: methamphetamine poisoning.

Case closed.

Yet doubts linger about Clark's fatal run-in with police. His mother, denied compensation last October in her county claim, has retained Santa Rosa attorney Michael Fiumara to file a wrongful death lawsuit. And though toxicology results show that both speed and LSD were present in Clark's bloodstream, the circumstances surrounding his death closely fit the profile of those who stand a good chance of dying in custody after struggling with police and being pepper-sprayed.

In California, law enforcement personnel use pepper spray once an hour. Once a month—or in one out of every 600 cases—a person dies after being pepper-sprayed by the police. In most of the cases, the victims are

Bad trip: Dustin Harley Clark partied on the night of his death.

obese (at 5-foot-9 and 205 pounds, Clark was slightly heavy for his height), middle-aged, under the influence of speed or cocaine, and engaged in frenzied and often bizarre behavior. In almost every case, the victim has a heart attack. Usually the victim stops breathing just as he begins to calm down.

"We are finding that in a large percentage of these deaths individuals may have a significant amount of drugs in their system—cocaine, methamphetamine, whatever," says John Crew, American Civil Liberties Union police procedures expert. "But the toxicology reports come back suggesting that the levels [of these drugs] aren't at a point normally thought to be lethal.

"In 100 percent of these cases police use the pepper spray and it doesn't work."

The active ingredient of pepper spray is oleoresin capsicum, an oily substance derived from the dried extracts of chili or cayenne pepper and mixed with an alcohol base. It is injected into a canister and dispensed in short bursts by an inert gas as a stream or fog.

When a person is dosed with pepper spray, the eyes swell and close instantly; mucous membranes become inflamed; coughing, choking, or shortness of breath accompanies the excruciating pain. It is much more potent than tear gas.

It also is a hot item in the growing law enforcement arsenal. Since the mid-'80s, the man most responsible for pitching pepper spray to the police is FBI Special Agent Thomas Ward, ex-chief of chemical weapons training at the FBI Academy in Quantico, Va. He zealously urged federal, state, and local law enforcement agencies to buy the stuff—especially the Cap-Stun brand—assuring them that it is 100 percent safe.

Last February, Ward abruptly resigned from the FBI and pleaded guilty to taking nearly $600,000 in payoffs from the company that made Cap-Stun.

Despite claims that pepper spray is safe, there never has been a comprehensive health study of its effects. In California, one of the last states to approve the use of pepper spray, a Cal-EPA Office of Environmental Health Hazard Assessment survey into the possibly lethal effect of pepper spray has succumbed to budget cuts.

Yet, OEHHA Director Carol Henry already had seen enough preliminary data to inform state Attorney General Dan Lungren in August 1993 that her agency was "concerned that in each [in-custody death] incident, untoward reaction to [pepper spray] may be the contributing cause of death, or may have exacerbated underlying conditions such as pre-existing disease or drug use to cause cardiac or respiratory failure."

Three weeks later, Lungren approved certification of pepper-spray products for civilian use.

A 1995 ACLU report, "Pepper Spray Update: More Fatalities, More Questions," examines 26 fatal cases between 1993 and 1995. It notes that state scientists have warned for several years that so little is known about the residual effects of pepper spray that medical examiners may not even know what to look for during an autopsy, a real problem since there is no red flag indicating its role in a death.

The major manufacturer of pepper spray for California law enforcement has advised that police use just a single one-second burst of the chemical or no more than two half-second bursts. "Anything more than that, ac-

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cording to the manufacturer, is ing a health hazard," says Crew.

While the Sonoma County Sh Department has set some of guidelines for the use of pepper those instructions lack any d about the actual amount of th that may be administered. "T nothing specific [in the guide about the length or burst," cor Sonoma County Sheriff's Lt. Dragos, who has provided che weapons training to deputies. "I guidelines [about dosage]. A t three-second burst or a three-t second burst. . . . It hinges m what you're dealing with.

"If you're fighting for your lif may use half a canister."

It's hard to say how much p spray Quinn used on Clark, b lice records obtained by the *So County Independent* show th blast fired from his canister likely exceeded the dosage r mended by manufacturers.

In an interview with SRPD i gators, Quinn said he decided pepper spray because Clar peared to be high on dr u deputy "didn't want to g him. . . . It was a good steady should have incapacitated he just let out a scream, w face, and got up."

How dangerous is excessive sure to pepper spray? "You ha ple who die after they have sprayed," Steven Beazer, presi Advanced Technologies, a ma turer of pepper spray device the *Los Angeles Times* in 1995. pepper spray have a role in s those deaths? I will say yes. It i to have an effect.

"These are weapons," he "Clearly, this is not a breath fre or an underarm deodorant."

The ACLU has stopped s calling for a ban on the weapor ever, the organization has pr model policies. "We have ca careful, strict policies controlli the weapon is used and mar how a suspect should be han ter pepper spray has been Crew says. "We also are callir thorough study on the health cations of this weapon—healt ies that have not been done. ognize that it's a challenge for forcement and that these indi are the most difficult to brin control.

"On the other hand, from cer's safety standpoint, if as lieve there is substantia chance that pepper spr be effective in these kin tions, then it's in the office terest not to think it's going t

Reporter Paula Harris contrit this article.

Police Misconduct and Civil Rights Law Report

Vol. 5, No. 8 March–April 1997

THE USE AND ABUSE OF PEPPER SPRAY

by Lynne Wilson

The author is an attorney in private practice in Seattle, WA who writes frequently about police misconduct litigation issues.

Late one June evening in 1995, San Francisco Police Officer Marc Andaya stood at the bottom of the stairway of the apartment building where Aaron Williams lived and called out for Williams to come down to talk. Williams, a 37-year-old suspect in a pet store robbery, stepped down the stairwell. When Williams reached the bottom, Andaya grabbed him and ultimately a dozen San Francisco officers piled into the effort to arrest him. The intense melee that ensued succeeded not only in subduing and arresting Williams; within the hour, probably by the time he reached the Richmond District Police Station or shortly afterward, Williams was dead.

Williams had been handcuffed from the rear and his legs had been placed in plastic restraints. At least three of the officers sprayed Williams directly in the face with pepper spray both before and after he was fully restrained and subdued. Once Williams was on the ground, officers kicked him in the face, then left him in the street bleeding for twenty minutes without calling for an ambulance. The officers then placed the comatose, dying Williams into a police van in a prone position.

No medical treatment was ever provided. No one ever attempted to wash or blow the pepper spray off Williams' face. No one ever monitored him to determine the effects of the spray. With macabre irony, Andaya and the other officers "forcibly placed a hospital mask over [Williams'] face to prevent dissipation of the pepper spray," further constricting his ability to breathe. *Williams v. City of San Francisco, Marc Andaya, et al.*, No. C-96-0705-SBA (N.D. Cal. filed Mar. 25, 1996), Complaint at 5–6.

Williams' death was, according to the local coroner, caused by the combined effects of cocaine toxicity, hog-tying and "excited delirium," a frenzied mental state induced by drugs or acute psychiatric disorders. Although pepper spray was not initially identified as a contributing factor in Williams' death, his death has been identified as one of over sixty nationwide that have occurred in police custody since 1990 after a suspect was sprayed. Mark Pinsky, "If Pepper Spray Isn't Lethal, Why All The Deaths?," L.A. Times, June 10, 1995, at A1 (hereinafter Pinsky).

According to the American Civil Liberties Union, California accounts for over half of the total: 32 people have so far died in custody after being pepper sprayed by California law enforcement officers. Allan Parachini and the ACLU of Southern California, *Pepper Spray Update: More Fatalities, More Questions* 1 (June 1995) (hereinafter ACLU Report) (detailing 23 of these fatalities). Nearly all California police officers are armed with pepper spray.

Across the country, 3,000 police departments now

Also in this issue . . .

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their arsenal of weapons. Pepper spray is specifically designated for dealing with individuals who are "extremely agitated, mentally ill, or under the influence of drugs or alcohol." National Institute of Justice Technology Assessment Program, *Pepper Spray as a Force Alternative* 1 (Mar. 1994) (hereinafter NIJ TAP Report). In addition, some 6.5 million civilians use pepper spray as a weapon for self-protection, although in a form that is only about one-fifth the concentration of that used by law enforcement. Virtually every state now authorizes it for both civilian and law enforcement use.

The National Institute of Justice's Technology Assessment Project lists sixteen manufacturers offering pepper spray products for sale in the United States. NIJ TAP Report at 5–6 (listing names, addresses and phone numbers). In addition, these manufacturers have two separate lobbying organizations representing them before state legislatures to ensure certification of their products for sale, the Aerosol Defense Spray Association and the Association of Defensive Spray Manufacturers. *Id.* at 5 (lists addresses and phone numbers). Because of these manufacturers' lobbying efforts, not a single state or federal agency has completed scientifically based testing on the contents or health risks of pepper spray, according to the U.S. Consumer Product Safety Commission. Lenore Anderson, "Berkeley Considers Pepper Spray Ban," COPWATCH Report, Winter 1996, at 3.

Since the introduction of pepper spray into the police arsenal in the early 1990s, its use has been surrounded with controversy, particularly over the circumstances in which it can be potentially lethal. The National Institute of Justice's Technology Assessment Program declares that there appear to be "no verified long-term physical effects or health risks associated with the use of [pepper spray]." NIJ TAP Report at 5. The International Association of Chiefs of Police (IACP) encourages its use on "violent, intoxicated/drugged and mentally ill individuals," blatantly asserting that it "has not caused any deaths, even among persons with pre-existing conditions." IACP, *Pepper Spray Evaluation Project: Results of the Introduction of OC into Baltimore, MD, Police Department* iii (June 22, 1995).

The medical research conducted to date, however, suggests otherwise. *See, e.g.*, Steffee, Lantz, Flannagan, Thompson & Jason, "Oleoresin Capsicum (Pepper) Spray ("OC") and In-Custody Deaths," 16 Am. J. Forensic Medicine & Pathology 185–92 (1995) (hereinafter Steffee et al.) (pepper spray may be capable of contributing to death where other factors such as drug intoxication or a frenzied mental state are present). Even the President of the Aerosol Defense [illegible] has this to say about his own product: "You have people who die after they have been sprayed. . . . Does pepper spray have a role in some of these deaths? I will say yes. It is going to have an effect. These are weapons. Clearly, this is not a breath freshener or an underarm deodorant." Pinsky, *supra*.

With law enforcement use of pepper spray increasing exponentially on the street, it is no wonder that "[t]he rising frequency of OC application has been paralleled by an increasing number of deaths-in-custody following its use." Steffee, et al. at 185. In spite of the NIJ's statement that "litigation has decreased since the use of the spray," pepper spray is becoming the focus of excessive force, wrongful death and product liability litigation. NIJ TAP Report at 5.

In an effort to help clarify some of the legal issues surrounding its use as a police weapon, this article will focus on: (1) pepper spray as a use of force and at what point its use becomes excessive; and (2) the current status of police department pepper spray policies and training and at what point a municipality might become liable for the failure to promulgate adequate policies or adequately train on its use. This article will also briefly discuss potential failure-to-warn product liability claims against manufacturers and the difficulties that litigators have encountered when attempting to assert such claims.

Background on Oleoresin Capsicum

Derived from the cayenne pepper plant, *oleoresin capsicum* or pepper spray was officially introduced into the United States by the Postal Service as a dog repellant in the 1980s. It is 300 times hotter than Jalapeno pepper and has been called a "naturally occurring inflammatory agent." Pepper spray is particularly popular with law enforcement because it avoids the major drawbacks of other chemical agents such as mace and tear gas: it doesn't blow back on the person using it and it can be washed off with relative ease because it is a "natural" substance.

When sprayed in the face, OC incapacitates a person not only by causing intense, painful burning of the skin, but also by causing eyes to swell and burn which forces them to shut automatically. OC spray also attacks the respiratory system when inhaled: The respiratory tract becomes inflamed and breathing is restricted. Granfield, Onnen & Petty, *Pepper-Spray and In-Custody Deaths*, IACP Executive Brief (Mar. 1994) (hereinafter IACP Report) (reviewing 30 in-custody deaths).

The pain caused by pepper spray is intense and can last up to 45 minutes if medical treatment is not provided. Some people who are intoxicated by certain drugs such as PCP or cocaine are not affected by

this "pain factor." However, law enforcement managers emphasize the effectiveness of pepper spray even on these individuals because "the closing of the eyes is a physiological reaction rather than a pain reaction [and] the worst case situation is that although the subjects don't feel pain, they can't see either." NIJ TAP Report at 1.

Ever since the late 1980s, OC, in liquid and foam form, has gained popularity among police as an alternative to using other weapons such as batons that cause more injuries. Police managers claim that pepper spray is "95 percent effective in stopping suspects almost immediately," compared to much lower "success" rates for tear gas and mace. The California Commission on Peace Officer Standards and Training (CCPOST) recommends pepper spray as superior to other chemical agents: "The chief advantage of OC is that it is consistently effective when used against combative persons with reduced sensitivity to pain." Training/Orientation Outline for OC, CCPOST (Revised Mar. 30, 1993).

Pepper spray has also been promoted, along with numerous other technologies, as an effective alternative to using lethal force. Mike Grudowski, "Not-So-Lethal Weapons," N.Y. Times, Aug. 13, 1995, Sec. 6, at 40 (sticky foam, rear-seat-airbags, snare nets, smart guns). In at least one federal case, a city was held liable for not training officers in alternatives to lethal force such as pepper spray. *Roy v. Inhabitants of City of Lewiston (ME)*, 42 F.3d 691 (1st Cir. 1994) (city and police chief liable for failure to adequately train officers in non-lethal alternatives for subduing dangerous but intoxicated persons).

In 1987, the FBI adopted pepper spray as its "official chemical agent." *See* ACLU Report, *supra*, at 18. Pepper Spray was considered an improvement over tear gas which reportedly does not work well on intoxicated or agitated persons. Its effectiveness and safety was promoted to local law enforcement agencies in a series of reports written by FBI Special Agent Thomas Ward, the chief chemical weapons expert at the FBI Academy in Virginia. In July 1989, Ward's report, entitled "Chemical Agent Research: Oleoresin Capsicum," was wired to every local police agency in the country, and in 1990 Ward travelled around the country promoting Cap-Stun as the FBI's approved OC brand. Ward's promotion no doubt provided the impetus for local law enforcement's nearly ubiquitous use of pepper spray by the early 1990s. Rhodes, "Cap-Stun Kickbacks," Policing by Consent, Apr. 1996, at 10–11.

Last spring, however, Ward pled guilty and was sentenced to federal prison for taking nearly $60,000 in payoffs from Lucky Police Products, the manufacturer of Cap-Stun and the country's second largest manufacturer of pepper spray. Because of his conviction, every study he authored and every promotion he made about pepper spray is now considered tainted. Allen, "Some FBI Agents Like It Hot," Covert Action Quarterly, Summer 1996, at 4–5. After Ward's conviction, the ACLU of Southern California called on the FBI to "immediately retract and rescind" all documented research on pepper spray and begin a "neutral investigation" into the substance. The FBI responded that although it was reviewing the studies, it continues to believe that OC "should continue to be used by its agents as a less-than-lethal weapon and an alternative to lethal force." "ACLU on New OC Push," Law Enforcement News, Mar. 31, 1996, at 1, 6.

Medical Implications and Causation

In a series of reports, the American Civil Liberties Union has raised concerns that the number of deaths in which OC has been a contributing factor may be much higher than the 61 so far documented. For example, although none of the autopsy reports for 28 post-spray deaths studied by its Southern California branch listed pepper spray as a cause of death, the group concluded that "documents recovered . . .

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establish that [California] state scientists have warned for more than two years that so little is known about residual effects of pepper spray that medical examiners may not know what to look for during an autopsy." ACLU Report at 1. (For copies of this report as well as those issued in 1993 and 1994, write to: ACLU, 1616 Beverly Boulevard, Los Angeles, CA 90026.) *But see* IACP Report at 4 (determination that OC was neither a cause nor a contributing factor in any of 22 cases studied).

The first autopsy report directly connecting pepper spray to an in-custody death was issued in July 1993 in Chapel Hill, North Carolina. That report noted that Angelo Robinson, a 24-year-old black parolee stopped for disorderly conduct, had bronchitis at the time of his death. Officers reportedly sprayed Robinson ten to fifteen times and "then placed him in a prone position on the ground while he was handcuffed, a position that has been known to cause death." The cause of death was stated as "asphyxia due to bronchospasm precipitated by pepper spray." Report of Autopsy Examination No. ME-93-658 (8/26/93) for Angelo Darcel Robinson, Chief Medical Examiner for Chapel Hill, N.C.

"Positional asphyxia" is most often seen as a major contributing factor in those in-custody deaths associated with pepper-spray. IACP Report at 4 (major cause of death in 18 of 22 cases with drugs or disease as contributing factors). It results when the body is placed in a position that causes the body weight to compress the chest which in turn causes respiratory failure. In connection with police in-custody deaths, it usually occurs when a person is handcuffed, placed on his stomach, and placed in ankle restraints or hog-tied. IACP Report at 4. Essentially, the person suffocates from the position his body has been placed in. Reay, Fligner, Stilwell & Arnold, "Positional Asphyxia During Law Enforcement Transport," 13 Am. J. Forensic Medicine & Pathology 90–97 (1992).

"Excited delirium" is a rare form of severe mania, sometimes part of the spectrum of manic-depressive psychosis and chronic schizophrenia. O'Halloran & Lewman, "Restraint Asphyxiation in Excited Delerium," 14 Am. J. Forensic Medicine & Patholgy 289–95 (1993) (discussing 11 cases of sudden death of men restrained in a prone position by police). "It is characterized by constant, purposeless, often violent speech and hallucinations with paranoid delusions." *Id.* at 292. Individuals in this state exhibit bizarre behavior, can be aggressive, exhibit great strength, have a significantly diminished sense of pain, and can become violent.

"Excited delirium" is often associated with cocaine intoxication. *Id.*, citing Wetli, "Fatal Cocaine Intoxication: A Review," 8 Am. J. Forensic Medicine & Pathology 1–2 (1987). According to the above mentioned report issued by the International Association of Chiefs of Police in 1994, "cocaine-induced excited delirium is usually regarded as a potentially lethal medical emergency." Most individuals, according to the IACP Report, "will respond to treatment," and thus do not die from this condition if treated properly. IACP Report at 9.

In part because "pathologists did not consider or had no reliable tests for pepper spray when determining cause of death," coroners almost never list OC as a cause of or a contributing factor to death. ACLU Report at 29. Often, police officers do not mention its use in police reports and therefore fail to inform medical examiners of its possible contribution to an in-custody death. ACLU Report at 22 (10 of 26 pathology reports made no mention of pepper spray, implying that pathologists are not informed that pepper spray was used on the decedent).

In the Aaron Williams case, for example, the San Francisco Medical Examiner stated the cause of death as "excited delirium" causing a fatal heart attack with a conclusion that there was no evidence of pepper spray in Williams' system. Young, "Dead Heat," S.F. Weekly, May 15–21, 1996, at 15. Plaintiffs' attorneys then had their own autopsy performed by pathologist Dr. Robert D. Lawrence. He declared that multiple factors were to blame for Williams' fatal heart attack: cocaine intoxication with violent toxic delirium, multiple exposures to pepper spray with resulting respiratory irritation and the hog-tie posture. "There is no way to determine the relative importance of each factor," stated Dr. Lawrence. "However, it is reasonably medically certain that all factors played a role in the death, and that the combination of factors, rather than any one factor, resulted in death." *Id.*

Pepper Spray as Excessive Force

According to the National Institute of Justice, most police agencies rank pepper spray on the use-of-force continuum "just after physical pain compliance and immediately before the use of impact weapons, i.e., batons." NIJ TAP Report at 5. The justification for placing OC at this low level is that "there appears to be no verified long-term physical effects or health risks associated" with its use. *Id.* In light of what is now known about pepper spray, placing it so low on the continuum is not justified by reality, at least with respect to certain individuals. More recently, some departments such as New York City have placed the use of pepper spray at the same level as a nightstick. Fazlollah, "Popular Police Tool Draws Fire," Phila. Inquirer, Dec. 30, 1996, at 1 (hereinafter Fazlollah).

Nearly every study that has looked at in-custody deaths and pepper spray has noted that the deaths

of cocaine-induced or psychosis-induced "excited delirium." ACLU Report at 28 (24 of 26 deaths involved people high on drugs or suffering from a serious psychiatric disorder); IACP Report (drugs and/or alcohol were involved in most of the 30 cases studied). These are the very people on whom pepper spray has no "pain compliance" effect and who are already in, according to the International Associations of Chiefs of Police, a state of acute medical emergency that by itself is potentially lethal without medical treatment. They also happen to be the very people at whom law enforcement officials are directing its use. *See, e.g.,* NIJ TAP Report at 1 (encouraging use on "subjects who are extremely agitated, mentally ill, or under the influence of drugs or alcohol").

In addition, none of the in-custody deaths studied by the ACLU "involve[d] people who posed a serious threat of violence to civilian bystanders when they were sprayed or who were engaged in serious violent criminal activity when or shortly before police arrived." ACLU Report at 28. Also, as the ACLU has pointed out, of the 26 deaths it investigated, "all of the victims were acting irrationally when police first contacted them, but pepper spray had a zero percent effectiveness rate on them. . . . In virtually every case, victims continued to struggle with officers after they were sprayed, sometimes becoming more combative." ACLU Report at 28–29. *See also* IACP Report at 4 (of 30 deaths studied, all subjects behaved in a "combative and/or bizarre manner and struggled with the police. . . . In the majority of cases, OC spray was either ineffective or less than totally effective"). A most telling illustration of pepper spray's ineffectiveness occurred in Oregon in 1992 when Officer Frank Ward [no relation to the FBI agent] was beaten to death by a burglary suspect whom he had sprayed with Cap-Stun. *Ward v. SNC Distributors, Inc.*, No. 9303-01609 (Multnomah County Or. June 1994), Third Amended Complaint.

Based on its study of 26 deaths in California, the ACLU came to a number of conclusions about police use of pepper spray in certain circumstances, two of which are supported by the conclusions reached in other comprehensive studies performed to date (IACP Report and Steffee, et al. *supra*):

1. Pepper spray is unlikely to subdue a suspect high on stimulant drugs or in a psychiatric crisis.
2. A clear statistical association exists between in-custody deaths, pepper spray use, hog-tying and other restraint techniques and drug intoxication or other mental health crises.

ACLU Report at 29.

These conclusions as well as the comprehensive studies that have documented the difficulties with pepper spray should be useful to any attorney who is litigating a wrongful death or excessive force case that involves police use of OC. Even though the National Institute of Justice recommends standard operating procedures that approve using pepper spray on "actively combative individuals who have resisted or ignored verbal commands," it is precisely in those situations where an excessive force situation is most likely to occur. NIJ TAP Report at 5. At least one professional has commented that an officer should not use pepper spray at all "unless he is attacked." Fazlollah, *supra* (quoting Professor James Fyfe of Temple University).

Where no pain compliance or other purpose is served by OC use on a high or agitated person (even where the person is struggling) and where the possible risk of using it is high (death), its use may be objectively unreasonable under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386 (1989) (reasonableness depends on circumstances in each case). *See also* Miller, "Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force," 28 Creighton L. Rev. 733, 770–75 (1995) (hereinafter Miller, "Less-Than-Lethal Force") (Officer Overreaction as Excessive Force). Furthermore, use of pepper spray prior to arrest and then failure to provide medical treatment afterward, particularly in a situation that clearly calls for it, can also be said to also be objectively unreasonable, excessive force under both the Fourth and the Eighth Amendments. *Id.* at 776–77 (Officer Indifference to Medical Needs).

Unfortunately, because pepper spray has only been in widespread use since 1992 and because it has only been connected with in-custody deaths since 1994, little case law has developed on these issues. One recent class-action suit involved a peaceful labor demonstration at the Staley Manufacturing Plant in Decatur, Illinois, on June 25, 1994. Police pepper-sprayed a crowd of over 2,000 demonstrators who had "gathered to exercise their rights of speech and association under the First Amendment." *Lamb v. City of Decatur*, 947 F. Supp. 1261 (C.D. Ill. 1996). In denying the defendants' motion for summary judgment, the *Lamb* court held that the Decatur police were not entitled to qualified immunity because the Staley demonstration was "an aspect of a basic constitutional right under the First and Fourteenth Amendments guaranteeing freedom of speech and assembly." *Id.* at 1264 ("What value would the First Amendment carry if its demonstrators could be dispersed or intimidated by police brutality or unnecessary force?"). The court also denied the defendants' motion for summary judgment on the question of excessive force, holding that under the rule of *Graham v. Connor*, genuine issues of material fact precluded summary judgment:

concerns, but also strong First Amendment concerns, a fact finder must decide what happened on June 25, 1994, and whether the force used by the defendants was reasonable under all of the circumstances.

947 F. Supp. at 1265.

In the absence of First Amendment considerations, other courts have wrestled with whether pepper spray use can be considered excessive force under the Fourth Amendment or "punishment" under the Eighth Amendment when combined with lack of medical treatment. Significantly, one federal court held that where there was evidence that an unruly trespasser posed no "physical threat" to any of the officers or where it was doubtful that "his behavior constituted anything more serious than disorderly conduct," it was an issue of fact for a jury to determine whether the use of chemical spray constituted excessive force for the purpose of a Fourth Amendment seizure. *Estate of Bryant v. Buchanan*, 883 F. Supp. 1222, 1225 (S.D. Ind. 1995). Also, in an unpublished opinion, the Fourth Circuit upheld an officer's four-day suspension for using unnecessary force with pepper spray. *Harris v. City of Virginia Beach*, 69 F.3d 532 (4th Cir. 1995) (reported in full, 1995 U.S. App. LEXIS 30912).

In a federal case based on the Eighth Amendment, a South Carolina prisoner sued under 42 U.S.C. § 1983 after he was pepper-sprayed and chained to a bare metal bunk for eight hours. The court held that chaining and pepper-spraying the plaintiff in those circumstances, without fumigating the cell or providing medical treatment, could only be interpreted as "punishment" rather than an attempt to quell a disturbance. *Williams v. Benjamin*, 77 F.3d 756 (4th Cir. 1996). However, in three cases involving pepper spray "cell extractions" at California's notorious Pelican Bay State Prison, the U.S. District Court for the Northern District of California has granted summary judgments of dismissal to defendant corrections officials on the basis of qualified immunity. *Bennett v. Cambra*, 1997 WL 88329 (N.D. Cal. 1997) (pepper spray may be used reasonably if a prisoner refuses after adequate warning to move from a cell); *Washington v. Cambra*, 1996 WL 507313 (N.D. Cal. 1996) (defendants repeatedly warned plaintiffs that they would resort to calculated use of chemical force to force TB testing); *Washington v. Cambra*, 1996 WL 417245 (N.D. Cal. 1996) (repeated warnings with videotape showing that plaintiff refused to submit to handcuffs).

In a criminal case, the Third Circuit discussed the potential danger of "Phaser Mace," a brand of pepper spray, in *United States v. Harris*, 44 F.3d 1206 (3d Cir. 1995). Harris, a convicted bank robber, had used the pepper to enhance Harris' sentence, the government attempted to show that the pepper spray was a "dangerous weapon." It submitted a promotional bulletin for Cap-Stun, which included some of the information summarized above connecting pepper spray to in-custody deaths, in arguing that pepper spray could cause "serious bodily injury." Although the district court agreed and added four points to Harris' sentencing calculation, the Third Circuit held that the government had not met its burden of proving that pepper spray was a "dangerous weapon." *Harris*, 44 F.3d at 1216. The *Harris* court concluded that the promotional bulletin "lacked sufficient indicia of reliability" for the purpose for which it was used. *Id.*

On the question of qualified immunity for individual officer defendants, the Tenth Circuit (in an unpublished opinion) granted one of the defendants qualified immunity for excessive force by pepper spray where there was undisputed evidence that the plaintiff continued to resist arrest after the officer's efforts to use a baton were ineffective. *Thompson v. City of Kansas City*, 79 F.3d 1156 (10th Cir. 1996) (published at 1996 WL 112104). Similarly, an Alabama court granted qualified immunity to a defendant officer even though the plaintiff was handcuffed at the time and the officer sprayed him directly in the face. *Griffin v. City of Canton*, 932 F. Supp. 1359 (M.D. Ala. 1996). The court held that the use of pepper spray was not excessive as a matter of law since it was "generally of limited intrusiveness" under the circumstances and since the plaintiff apparently suffered no physical injuries as a result. *Id.* at 1368. *See also United States v. Holloway*, 906 F. Supp. 1437 (D. Kan. 1995) (use of pepper spray directly into criminal defendant's face while he was handcuffed was not an unreasonable use of force to extract evidence of narcotics in his mouth).

In another case, involving mace rather than OC, the Sixth Circuit held that questions of material fact precluded summary judgment on the question of qualified immunity where there were fact disputes as to whether the plaintiff was incapacitated. *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994). The court held: "If the jury determines that Metiva . . . gratuitously maced a helpless and incapacitated person, then as a legal matter no reasonable officer would believe that such conduct would not violate plaintiff's constitutional rights. . . . A reasonable person would know that spraying mace on a blinded and incapacitated person sitting in a car would violate the right to be free from excessive force." *Id.* at 387. *See also Lamb v. City of Decatur*, 947 F. Supp. 1261 at 1265 (C.D. Ill. 1996) (analogizing *Metiva* and use of mace to use of pepper spray and denying summary judgment on the issue of excessive force).

Given the widespread current knowledge, at least in law enforcement circles, of the potential dangers of pepper spray, a municipality's failure to promulgate a chemical restraint policy can provide the basis for imposing Section 1983 liability. The National Institute of Justice advises "specific, prescribed guidelines for the use of OC," to include at a minimum: (1) appropriateness of use, (2) necessity of warnings, (3) decontamination procedures (ventilation and water for flushing the face and eyes), (4) incident documentation, and (5) possible sanctions for indiscriminate use. NIJ TAP Report at 5.

The ACLU, as part of its 1995 Report, proposed detailed policies for both police and corrections agencies, including a prohibition against leaving a person who has been sprayed "lying on his/her stomach or side for a period longer than required to put restraints in place." ACLU Report at B-2 to B-7. The 1995 Report also recommended that departments adopt policies prohibiting officers from using OC on suspects who fit the criteria for in-custody death syndrome, but to date no department has done so.

The Philadelphia Police Department has gone further than any other large city department in adopting cautious pepper spray procedures. In 1995, the Department adopted a comprehensive policy on pepper spray use that includes strict rules regarding post-spray medical treatment and special reporting requirements. Directive 43: Pepper Spray, Philadelphia Police Department (11/30/95). In 1996, Police Commissioner Neal directed officers not to use the spray against nonviolent suspects, orderly crowds, children, the elderly, pregnant women or people believed to be suffering from heart or respiratory problems. He also directed officers to closely monitor suspects who have been sprayed and to bring all such suspects to hospitals for immediate treatment. Appendix A to Directive 43: Pepper Spray, Philadelphia Police Department (10/18/96).

The reality is that although most large cities have written guidelines on OC use, most small rural and suburban departments do not. Fazlollah, *supra*. In addition, most departments, small and large, rely on manufacturers to provide officer training in pepper spray use, a situation that creates potential inadequate training liability for the cities that do so. In one recent case in Pennsylvania, a small department police chief testified that "his seven-member department had no written rules on using the spray, that the only training was provided by the department's pepper-spray supplier, and that he did not know the content of the training." Fazlollah, *supra* (summarizing deposition of Collegeville Police Chief John Clawson).

With respect to failure to promulgate an adequate chemical restraint policy, numerous federal courts have tion of procedures, a city's deliberately indifferent failure to do so is actionable under Section 1983. *City of Canton v. Harris*, 489 U.S. 378 (1989) (deliberate indifference established "where the need . . . is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need"). Because courts have extended *City of Canton* to apply to a municipality's "deliberately indifferent" failure to adopt a policy where the need for doing so was obvious, a strong argument can be made that the need for an OC policy has been "obvious" since 1994 when the National Institute of Justice recommended it and that the likely "consequences of not adopting [such] a policy [is the] deprivation of constitutional rights" in the form of increased excessive force. *Rhyne v. Henderson*, 973 F.2d 386, 392 (5th Cir. 1992) (failure to adopt a policy regarding care of known suicidal inmates).

Other courts have held municipal policymakers liable for failure to adopt policies when the need was obvious. The Ninth Circuit upheld a jury determination that a county was deliberately indifferent to the constitutional right of a pretrial detainee not to be incarcerated without prompt pretrial procedures. *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992). The County Sheriff, a municipal policymaker, failed to institute procedures to detect inmates who did not receive prompt arraignment, knowing that some of them would remain incarcerated and that the lack of procedures made it "virtually certain that some inmates" would suffer unconstitutional deprivations of liberty. The need for procedures was so obvious that the Sheriff's failure to promulgate them constituted deliberate indifference. *Id.* at 1478.

Similarly, a city has been held liable for its deliberately indifferent failure to adopt a policy regarding the non-custodial strip searches of arrestees. *Timberlake v. Benton*, 786 F. Supp. 676 (M.D. Tenn. 1992). The court in *Timberlake* stated:

> [A] failure to set a policy governing such a highly intrusive police action can render a City's actions as culpable as if they had a policy permitting unreasonable searches themselves. A local governing body does not shield itself from liability by acting through omission. Thus, when a city provides no guidance to its officers regarding such intrusive actions as strip searches, it must face the consequences of its inaction.

Id. at 696. *See also Reynolds v. Borough of Avalon*, 799 F. Supp. 442 (D.N.J. 1992) (where risk of sexual harassment in workplace is obvious, employer's failure to adopt a policy forbidding it could subject it to liability).

failure to adopt a policy regarding the use of pepper spray. In *Rhyne*, the Fifth Circuit used as an example of deliberate indifference "a municipality that arms its officers with firearms, knowing to a moral certainty that the armed officers will arrest fleeing felons[,]" but fails to train the officers properly in the use of deadly force. *Rhyne*, 973 F.2d at 392. By analogy, a municipality that arms its officers with pepper spray, knowing to a moral certainty that the armed officers will encounter mentally ill, drug-intoxicated or extremely agitated people, but fails to train them properly in its use and fails to provide them with guidelines, is deliberately indifferent to its own citizens' constitutional rights. *See, e.g., Titcomb v. State*, 222 N.Y.S.2d 596 (1961) (state held negligent for failing to instruct its officers that tear gas could be lethal).

Finally, with respect to training, police departments cannot ignore administrative complaints currently being filed by police and corrections officers challenging the practice of being sprayed in the face during OC Training. The Florida Labor Department, for example, banned use of the spray during training after Florida Highway Patrol Lt. Harold Frear filed an administrative complaint. "Pepper Spray Hazardous," Seattle Times, July 2, 1996, at A10. Labor Department officials who investigated stated that the "spray contains hazardous chemicals and at least four troopers sprayed with the chemical suffered injuries serious enough to require medical attention." *Id.*

Similarly, in North Carolina, Corrections Officer Ann Ryder filed a complaint with the Division of Occupational Safety and Health of the North Carolina Department of Labor. Allen, "In the Line of Fire: Should Workers Be Pepper Sprayed?," Mountain Express (Asheville, N.C.), Oct. 16–22, 1996, at 10. Ryder likened being sprayed in the face with pepper spray to "bobbing for french fries in a deep-fat fryer." *Id.*

In support of Ryder's complaint, Dr. Woodhall Stopford of Duke University Medical Center filed an in-depth description of the medical risks associated with OC, perhaps the most comprehensive compiled to date. Statement of Dr. Woodhall Stopford Concerning the Pathophysiology of Capsaicin and Risks Associated with Oleoresin Capsicum Exposure (07/23/96) (includes bibliography of all U.S. and international medical studies). He states that the federal Occupational Safety and Health Administration recommends no exposure to OC spray during training. *Id.* at 4.

Based in part on Dr. Stopford's medical assessment, in September 1996 the North Carolina Department of Labor recommended to the state Department of Correction that because a "direct (full-face) exposure [of OC spray] poses a health risk, . . . alternatives to full exposure training" should be explored. These alternatives included indirect rather than direct exposure health conditions might be exacerbated by direct spraying. Letter from N.C. Dep't of Labor to N.C. Dep't of Corrections (9/20/96). According to the state Department of Labor, the Department of Corrections has modified its policies not only to comply with these recommendations but also to conform to numerous other state correction agency policies that do not require full-exposure training. Ryder's lawsuit on this issue is now on appeal after initially being dismissed by the trial court. Allen, *supra*.

Product Liability Claims Against Manufacturers

Under common law, manufacturers of commercial products are required to warn users of their products of any limitations upon product uses or what precautions are required under differing use conditions. Keeton et al., *Prosser and Keeton on the Law of Torts* § 99, at 697–98 (5th ed. 1984). An officer or department sued for negligence or excessive force by use of pepper spray may shift fault to the manufacturer claiming a failure to warn, and where the plaintiff has not directly sued the manufacturer, the officer or department defendant "can implead the manufacturer to force the manufacturer to take the place of the original defendant." Miller, "Less-Than-Lethal Force," *supra*, at 784 (Liability Analysis: Supplier Liability).

Although a number of plaintiffs have asserted "failure to warn" claims against OC manufacturers, success has been mixed. At least three cases have settled for substantial amounts. Cap-Stun makers quickly settled the product liability claim brought in 1994 in Multnomah County, Oregon, by the widow of an officer beaten to death by a burglary suspect whom he had sprayed. *Ward v. SNC Distributors, Inc.*, *supra*. Attorney Chris Haberman of Visalis, California, settled one case without filing suit where an independent autopsy revealed a mysterious "sludging" or "sickling" in his [African-American] client's blood that may have been precipitated by pepper spray. Rhodes, "Pepper Spray, Product Liability and Cops," Policing by Consent, Aug. 1996, at 12. A diabetic jail inmate in Montgomery County, Alabama, entered into a $273,000 settlement with the county and the pepper spray manufacturer after being sprayed and subsequently losing his left eye. *Goodman v. Montgomery County*, No. CV-92-H-1170-N (M.D. Ala. May 1993), reported in 37 ATLA L. Rep. 56 (Mar. 1994).

Attorneys for Aaron Williams' widow, Clarence Livingston and Robert Kroll of San Francisco have included a pendent product liability claim against the pepper spray manufacturer Defense Technology in their civil rights lawsuit now in federal court. In a recent interview however, Kroll stated that he does not expect that portion of the suit to survive a pending summary judgment

motion based on dismissals of two similar product liability claims against Defense Technology in California courts. In those cases, both filed by California attorney Chris Haberman, Defense Technology successfully argued "that it was certified by the state of California to distribute pepper spray and, therefore, immune from any civil liability." Young, "Dead Heat," *supra* at 16. Both cases are currently on appeal.

Conclusion

Any new police technology requires constant and caring vigilance to ensure that it is not transformed into a weapon of torture. Pepper spray, whether you see it as a "natural" alternative to lethal force or as a "contributing factor" to death, is no different. Aaron Williams is as dead from his violent encounter with San Francisco Officer Marc Andaya as he would have been had he been shot. It is no coincidence that Officer Andaya had a history of using unwarranted deadly force; that he and the officers with him switched to a modern "non-lethal" weapon is cold comfort. *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992) (medical evidence in record undermined Andaya's version of events where he shot decedent nine times while employed by Oakland Police Department). According to attorneys for the Williams family, Officer Andaya and the others were recently cleared in administrative proceedings of using excessive force on Aaron Williams, but a decision to discipline them for failure to provide Williams adequate medical treatment was upheld by the San Francisco Board of Supervisors.

CASE UPDATES

Certiorari Granted

On February 24, 1997, the United States Supreme Court granted certiorari in a prosecutorial immunity case entitled *Kalina v. Fletcher,* 93 F.3d 653 (9th Cir. 1996), *cert. granted,* 117 S. Ct. 1079 (1997). Lynne Kalina was a deputy state prosecutor who sought and obtained a warrant for the arrest of Rodney Fletcher on the charge of theft. In the verified application for the warrant, she set forth the results of the police investigation, which Fletcher alleged contained false statements in several material respects. The charges were subsequently dismissed based on these inaccuracies in the application, and Fletcher filed a Section 1983 claim against Kalina. On Kalina's motion for summary judgment, the district court denied her request for absolute prosecutorial immunity, and further held that the question of qualified immunity was one of fact for the jury. Kalina took an interlocutory appeal, and the Court of Appeals for the Ninth Circuit, after noting that the case presented a question of first impression in that Circuit, affirmed the district court. *Fletcher v. Kalina,* 93 F.3d 653 (9th Cir. 1996).

Applying the functional analysis, the court of appeals found the prosecutor's "actions in writing, signing and filing the declaration for an arrest warrant" to be "virtually identical" to the police officer's actions in obtaining an arrest warrant in *Malley v. Briggs,* 475 U.S. 335 (1986), which held that such actions were only entitled to the protection of qualified, rather than absolute, immunity. 93 F.3d at 655–56. Relying on *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Ninth Circuit found that it would be "'incongruous' to expose police to potential liability while protecting prosecutors for the same act." 93 F.3d at 656. The court of appeals further found that there was "little, if any, distinction" between the obtainment of the warrant at the time the felony complaint was issued, as the police officer did in *Malley*, and the later obtainment, contemporaneous with the filing of the information, by prosecutor Kalina in the case at bar, for purposes of determining whether the acts were investigative or advocative in nature. 93 F.3d at 656 n.2.

The Supreme Court granted certiorari on the following issue:

> Is prosecutor who has brought formal criminal charges against defendant entitled to absolute immunity from Section 1983 liability when, pursuant to state statute and court rule, she causes arrest warrant to issue for purpose of bringing defendant before court to respond to charges brought?

60 Crim. L. Rep. (BNA) 3187 (Feb. 26, 1997).

In the Circuits

Bifurcation

In *Martin v. Heideman*, 106 F.3d 1308 (1997), the Sixth Circuit Court of Appeals considered the propriety of bifurcating liability and damages in a Section 1983 excessive force case, as well as whether the right to be free from excessively forceful handcuffing was a clearly established Fourth Amendment violation at the time of the incident in question. According to the evidence adduced at trial, the plaintiff and an acquaintance reenacted, for insurance purposes, an accident which had occurred between them several weeks before. They then called the police to the scene to file a police report concerning the "accident," and the police who arrived quickly discerned that the "accident" was staged. The subsequent events were disputed. According to the plaintiff and his associate, the officers became abusive, and pursuant to arresting him for a misdemeanor offense, pushed him over a guard rail and to the ground, thrust his head repeatedly against the pavement, twisted, pulled and contorted his hand, neck, and

head, and otherwise physically abused him. Plaintiff further alleged that the police handcuffed his wrists too tightly, and that they refused to loosen the handcuffs despite his repeated complaints of numbness and swelling. He alleged injuries that included a fractured right clavicle, bruises to the head, face, neck, and shoulder, permanent injuries to his arm, shoulder, neck and elbow, as well as post-traumatic stress disorder (PTSD). The police defendants asserted that plaintiff physically resisted his arrest, and that they responded to this resistance with a reasonable amount of force in order to overcome the resistance and effect the arrest.

Before trial, the district judge bifurcated the case pursuant to Fed. R. Civ. P. 42(b), and limited the medical evidence to be admitted on the liability phase to that which concerned causation. At trial, the court further narrowed this ruling, and refused to admit medical evidence establishing the extent and severity of plaintiff's injuries, including evidence about subsequent doctor visits, two elbow surgeries, and the PTSD diagnosis. At the end of plaintiff's case, the district court granted qualified immunity to the police defendant who had handcuffed him because there were several handcuff cases on either side of the issue at the time of the incident, and the jury subsequently entered a verdict in favor of the remaining defendants.

On appeal, the Sixth Circuit, in a 2–1 decision, reversed the district court. The majority held that the district court denied plaintiff "substantial justice" by excluding the medical evidence that established the severity of his injuries, and abused its discretion in bifurcating the liability and damages issues. In determining the exclusion issue, the court looked at the elements of proof in a civil rights case involving excessive force, and concluded that the necessary reasonableness determination required that the nature and quality of the intrusion on the plaintiff's Fourth Amendment interests, which in this case was the use of force, be established, then balanced, with the governmental interests at stake. Hence, the severity of the injury, which, the court recognized, "may not be apparent immediately after an accident," would "clearly be relevant to establish the amount of force used." 106 F.3d at 1312. Therefore, the court held that the "district court's attempt to draw a simple line excluding all evidence beyond the emergency room notes was error, requiring reversal." *Id.* Additionally, "because the extent of the plaintiff's damages was relevant to the question of liability, the district court abused its discretion by bifurcating the trial." *Id.*

Finally, the majority also reversed the determination that the officer who handcuffed the plaintiff was entitled to qualified immunity. After reviewing numerous conflicting decisions in various circuit courts of appeal and district courts, the majority turned to the 1993 Sixth Circuit decision in *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir. 1993), in which the court held that an officer who handcuffed a woman with a shoulder injury was not entitled to qualified immunity. After noting that "although *Walton* was decided in 1993, the incident occurred in 1988, and we confidently denied qualified immunity because the case presented a genuine issue of fact regarding whether excessive force was used," the court applied *Walton* and held that "because clearly established law in 1991, the time of the incident in this case, prohibited an officer's use of excessive force, and because a genuine issue of material fact exists as to whether [the] officer [here] used excessive force under the circumstances, the district court erred in granting [the defendant officer] qualified immunity on the handcuffing issue." 106 F.3d at 1313.

Excessiveness of Verdict

In *Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997), the plaintiff obtained a $201,500 verdict on her Section 1983 and common law claims that she was battered and falsely arrested and imprisoned by District of Columbia police officers for the offense of disorderly conduct, and that these actions were taken pursuant to a municipal policy, practice and custom of failing to properly train District officers in the enforcement of the disorderly conduct laws. At trial, the plaintiff testified that she was stopped for speeding by two District police officers who became verbally abusive towards her when she repeatedly inquired as to the reason for her stop. They then placed her under arrest for the alleged offense of disorderly conduct, pulled her arms behind her back in a painful manner, pushed her head into the hood of her car, breaking her glasses and bruising her face, handcuffed her, pushed her into the back seat of their squad car, and took her to the station. The officers' testimony was similar to that of the plaintiff, except that they asserted that she had been loud and belligerent, and had disrupted the neighborhood in which her arrest took place. However, two other witnesses corroborated the plaintiff's testimony that she was not disorderly. Both sides presented experts on the issue of the proper enforcement of disorderly conduct laws, and both agreed that under plaintiff's version of the facts, her arrest was improper.

The jury returned verdicts for the plaintiff on all her claims except for common law assault and battery and punitive damages, but the trial judge refused to enter judgment on the verdicts, and instead granted the defendants' motion for judgment in their favor as a matter of law. Plaintiff appealed, and the defendants advanced only one argument in defense of the ver-

court of appeals rejected this argument, reversed the district court's entry of judgment for the defendants as a matter of law, and reinstated the jury verdict, except for the verdict against the District on the *Monell* policy-and-practice claim; it vacated the municipal verdict in order to avoid deciding the constitutional issue raised by that verdict, a decision it considered to be rendered unnecessary by the fact that the District of Columbia was responsible for the entire verdict pursuant to plaintiff's *respondeat superior* claim. *Langevine v. District of Columbia,* 1994 U.S. App. LEXIS 30758 (D.C. Cir. Oct. 24, 1994) (mem.). On remand, the district judge permitted the defendants to file a motion for a new trial, then granted it on the basis that the verdict was contrary to the weight of the evidence and excessive. The case was subsequently transferred to a new district judge, Aubrey Robinson Jr., due to the ill health of the original judge, and Judge Robinson vacated the new trial order and entered judgment for the plaintiff on the jury verdict.

The defendants then appealed, arguing that Judge Robinson was barred from reconsidering the new trial order by the law of the case doctrine, and further that the verdict was excessive. A majority of the court of appeals affirmed Judge Robinson, holding first that law of the case did not apply because the new trial order was interlocutory in nature, and then that such orders can be reconsidered at any time during the pendency of the litigation. The majority further held that Judge Robinson's reconsideration order could be reviewed only for abuse of discretion, and that, given the evidence supporting the verdict, he was clearly within his discretion to grant the motion. Finally, the majority held that the $201,500 verdict was not excessive because the amount was not "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." 106 F.3d at 1024. In upholding the verdict, the court stated:

> In this case, the jury awarded Langevine $1500 for property damage to her car and glasses and $200,000 for "bodily injury, physical pain and suffering [and] mental anguish." The award was supported by evidence that: (1) Langevine's glasses were broken during her arrest and her car was damaged when Officers Kelsey and Johnson left it unattended on the street rather than impounding it for safekeeping; (2) Langevine's arms were wrenched behind her and her face slammed into the hood of the police car at the time of her arrest; (3) Langevine's wrists were bruised by the handcuffs and the bruises were still visible at trial, more than three years after her arrest; (4) Langevine suffered headaches and neck pain after the incident; (5) Langevine was humiliated in front of her daughters; (6) Langevine suffered emotional distress during her arrest and incarceration and feared for her safety; (7) Langevine suffered humiliation and loss of reputation when she was forced to explain to her church and an elderly woman for whom she cares that she was absent from services because she had been arrested; (8) long after her arrest, Langevine continued to feel "spiritually wounded" and to fear police officers. Although the jury found against Langevine on her assault and battery claim, the import, if any, of that verdict was before Judge Robinson at the time he ruled. For the damages awarded for the liability found, it surely was not an abuse of discretion for Judge Robinson to conclude that the verdict was not so unreasonably high as to result in a miscarriage of justice.

106 F.3d at 1025–26.

Excessive Force

In *United States v. Johnstone*, 1997 WL 74513 (3d Cir. Feb. 24, 1997), the Third Circuit Court of Appeals addressed the temporal limitations of Fourth Amendment seizures for purposes of determining whether applications of excessive force at various stages of the arrest process must be analyzed under the Fourth Amendment reasonableness standard or under Fourteenth Amendment substantive due process. In *Johnstone*, the defendant was a former municipal police officer who was prosecuted and convicted under the criminal civil rights statute (18 U.S.C. § 242) for six separate incidents of excessive use of force, which included kicking, punching, and smashing the victims' heads against the hoods of cars and with his flashlight. In the majority of the incidents, the excessive force occured after the victim was handcuffed; in all but one of the incidents the force was applied before or while the victim was placed in the squad car, while on the other occasion the force was applied upon arrival at the station. On appeal the defendant officer argued that the trial court erred in instructing the jury that it should determine whether he had violated the victims' constitutional rights by applying the Fourth Amendment reasonableness standard exclusively rather than instead of, or together with, the "shocks the conscience" substantive due process standard. In the defendant's view, the "shocks the conscience" standard should have been invoked because, in the incidents where the victim was handcuffed before he was subjected to excessive force, the force was employed after the "lawful restraint and arrest" of the victim, who was therefore a pre-trial detainee entitled only to the less rigorous protection afforded by substantive due process.

The court of appeals rejected this argument. Noting that the standard to be applied was the same as that employed in civil cases brought under Section 1983,

the court turned to *Graham v. Connor*, 490 U.S. 386 (1989), to determine the appropriate standard. It first acknowledged that the Supreme Court in *Graham* did not resolve whether the Fourth Amendment continues to protect individuals "'from the deliberate use of excessive physical force beyond the point where the arrest ends and pretrial detention begins,'" nor did it "precisely determine the particular point at which the 'seizure' ends and the pretrial detention begins," either in terms of time or place. 1997 WL 74513 at *3. However, the court further pointed out that the victim in *Graham* was afforded the protection of the Fourth Amendment even though he was physically abused after he was handcuffed. Hence the *Graham* Court "implicitly held that an arrest is a continuing event that does not end as soon as a suspect is first restrained" and that this decision "shows that handcuffing is not the point at which a seizure ends for purposes of the application of the fourth amendment." 1997 WL 74513 at *4. Leaving aside the station house incident, "the facts in *Graham* were nearly identical to those . . . in the case at bar." *Id.*

The beating in the station house garage was the "most troubling" of the incidents to the court because it was "the closest—both temporally and spatially—to pretrial detention in the station house," but the court, constrained by its holding in *Graham v. Township of Manalapan*, 47 F.3d 628 (3d Cir. 1995), a Section 1983 case in which the plaintiff had been physically abused in the police station parking lot as he was dragged from the squad car to the station house, held: "We believe that the facts in *Graham* are nearly identical to those surrounding the beating of Perez in the station-house garage, and we are thus bound by *Graham* to find that Perez' assault took place during the course of arrest even though he had already been transported to the station house." 1997 WL 74513 at *4.

The court noted that determining "where the seizure ends and pretrial detention begins is a difficult question" and that it "does seem problematic for a constitutional standard to change at some particular moment during an encounter between a citizen and a law enforcement official," but further stated that it "need not draw this line here because [defendant's] conduct would fall squarely onto the seizure side of any line we would draw." *Id.* at *3. The court therefore held that each of the six incidents of excessive force was entitled to the protection of the Fourth Amendment:

> In holding that [the defendant] carried out each of the assaults during the course of arrest, we observe that a "seizure" can be a process, a kind of continuum, and is not necessarily a discrete moment of initial restraint. *Graham* shows us that a citizen can remain "free" for fourth amendment purposes for some time after he or she is stopped or even handcuffed. Hence, pretrial detention does not necessarily begin the moment the suspect is not free to leave; rather, the seizure can continue and the fourth amendment protection against unreasonable seizures can apply beyond that point. *Id.* at *6.

The defendant also assigned error to the trial court's instruction on intent. The statute itself provides that the defendant must *willfully*, while acting under color of law, deprive another of a right, privilege or immunity under the constitution or laws. The instruction given defined willful as "an intent to violate a specific right," but also further set forth that the intent could be "inferred from all the surrounding circumstances . . . shown by the evidence," and stated:

> It is not necessary for you to find that a defendant was thinking in constitutional terms at the time of the conduct in question. You may find that a defendant acted with the required specific intent even if you find that he had no real familiarity with the Constitution or with the particular constitutional right involved, here the right to be free from the use of unreasonable or excessive force, provided that you find that the defendant intended to accomplish that which the constitution forbids.

Id. at *8.

The court of appeals, relying on the "celebrated" case of *Screws v. United States*, 325 U.S. 91 (1945), upheld this instruction. After noting that *Screws* was somewhat "confusing" and appeared "facially inconsistent" with regard to its definition of willful, it nonetheless based its affirmance on the portion of the *Screws* decision that held that willfulness did not require the defendant to be "thinking in constitutional terms," provided that his "aim" was to "deprive a citizen of a right and that right was protected by the constitution," and that recognized that willfulness included acting in "open defiance or reckless disregard of a constitutional requirement which has been made specific and definite." 1997 WL 74513 at *6–7. The court also rejected the defendant's argument that the district court was "required to charge the jury that it could find him guilty only if they found that he knowingly violated *state law* prohibitions against excessive force," holding that it is "the constitution itself that defines the standard for excessive force," rendering state law to be "simply of no consequence." *Id.* at *7.

City of Berkeley

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COUNCIL ACTION
September 9, 1997

To: Honorable Mayor and
Members of the City Council

From: Susan Burnett Luten, Pepper Spray Task Force

Subject: USE OF PEPPER SPRAY IN BERKELEY

RECOMMENDATION:

That Council should not prohibit the use of pepper spray by the Berkeley Police.

That Council should not prohibit the sale of pepper spray to the public. However, Council should consider requiring warning labels and encouraging training for purchasers of pepper spray.

BACKGROUND:

I respectfully submit this report to the Council because I strongly disagree with the reasoning and conclusions presented by the majority of the Task Force, as well as its recommendations. This report will discuss the defects in the majority's analysis, and the reasons why its conclusions must be disregarded.

Should the City Council prohibit the use of pepper spray by the Berkeley Police?

No. There is no evidence or competent argument to justify prohibiting the Berkeley Police from the continued use of pepper spray under the current protocols.

The information available to the Task Force support the opposite conclusion - it would be irresponsible for the Council to terminate pepper spray use.

Comments on the Task Force's Work and the Majority Conclusion

The Task Force was composed of nine commissioners, all of whom approached the project with sincerity. Although in some cases a distinct bias was obvious from the start, all of the Task Force members worked very hard.

However, there was lack of intellectual or investigative discipline throughout the process. Statements from people quoted in newspapers articles were adopted without question, while the statements of police officers about their first-hand experience was ignored or discounted. The accounts of events from people in the process of suing the City was accepted as fact, without any acknowledgement of the obvious bias of the speakers. The Task Force majority's conclusions must be examined in light of these shortcomings in the process.

The Majority Recommendation is Based on the Wrong Analysis

The decision of the Task Force majority to advise the Council to discontinue the use of pepper spray or oleoresin capsicum (OC) by the Berkeley Police Department (BPD) is based on defective logic and insupportable assumptions in the face of a lack of scientific information quantifying the risk of OC use. The Task Force focused only on the effects of OC on the general health of persons who are exposed, when the real questions are 1) what is the relative effect of OC (versus guns and/or batons) on the health of persons against whom force must be used by police; and 2) what is the risk to Berkeley police officers if OC is not available to them as a weapon?

The simple fact of the matter is that weapons must be used against people by the police in certain situations. The police now have a choice between weapons that are designed to control the subject by inflicting direct, serious, traumatic injury (guns and batons) or pepper spray, which is designed to inflict immediate pain and discomfort, but no long-term or traumatic injury. If OC is eliminated from the arsenal, then the only choices will be far more violent and logically more destructive than pepper spray. This question was never asked or answered by the majority.

The Task Force majority's conclusion is based on the assumption that persons who must be subdued by police face either OC exposure or nothing. The assumption is clearly false. Persons who must be subdued will be subdued, and if not by pepper spray, then by guns or batons.

The Task Force Did Not Investigate the Relative Safety of OC Use, Compared to Guns and Batons

There is little to dispute that OC causes severe immediate effects (burning eyes, blurred vision, gagging, coughing and the like) in about 85-95% of the population. That is the point of using it. There is little dispute that persons with breathing disabilities (such as asthma, emphysema, and allergies) face more serious effects which may include long-term injuries and even death. There is little dispute that for the vast majority of persons, pepper spray poses no danger of long-term injury or death if protocols used by the BPD (immediate examination by medical personnel, transportation to medical facilities for care, and proper use of restraints and ensuring upright posture) are used after exposure. In fact, there is not a single account of a single death occurring when these protocols are used.

The Task Force Did Not Consider the Relative Risks of OC to Those of Guns and Batons for Persons with Disabilities

The Task Force has serious and legitimate concerns about the obvious and acknowledged danger OC poses to persons with disabilities such as asthma and emphysema. Since these disabilities are invisible, they are probably not apparent to an officer faced with the possibility of using pepper spray. While Berkeley police protocols prohibit use when the subject has any discernible disability placing him or her at greater risk, prohibiting the use of pepper spray does not protect that person from injury: the police must use force of one kind or another even against subjects who may be at greater risk of injury from OC.

If the majority recommendation is followed and police use of pepper spray is banned, all potential subjects face the use of only two police weapons - guns and batons. This logically results in increased risk of death or serious injury for everyone, including those with disabilities vulnerable to pepper spray.

The evidence available to the Task Force suggests that those suffering from breathing conditions and allergies are at greater risk of death or serious injury by exposure of pepper spray. But greater risk from what? Greater risk than no exposure to OC. However, there is no evidence at all - and the Task Force has not even attempted to determine - that such persons are at a greater risk of death or serious injury from OC than guns or batons. While persons vulnerable to OC may be better off if there is no force used against them at all (as the majority assumes), that is not the realistic situation. The question is whether they are better off with OC or with guns and batons.

There is no evidence that persons with disabilities have a lessened risk of death or serious injury if only guns and batons are available. Logic suggests that they would be no better off, and possibly worse.

The Task Force did not investigate whether persons who have disabilities would be at greater risk of death or serious injury if a gun or baton were used instead of pepper spray. Such persons might include these with blood or bone disorders and the like. And logic dictates that the average person would fare far better with exposure to pepper spray than to a gun or baton.

In summary there is no support for the Task Force majority's conclusion that OC must be prohibited because persons with disabilities are at greater risk than average persons.

The Task Force Did Not Compare Risks of OC with Guns and Batons

OC used properly does not cause death or long-term injury. In that sense, it is "safe". The fact that it may cause death or long-term injury in a small portion of the population means that the risks of those results must be weighted against the risks of death and long-term injuries resulting from the other weapons used by police - guns and batons.

The Task Force made no effort whatsoever to make such an evaluation. The Task Force asked whether OC use is "safe" in a vacuum. It assumed that if OC is not used in a given situation that the subject will not face any injury from any other weapon. That is not realistic. If the subject must be controlled, then a weapon must be used. The question is therefore far more subtle than the Task Force majority appreciated: are the risks to these who would suffer more serious injuries or death by OC use

any more or less at risk if guns or batons are used? There was no evidence, discussion or data before the Task Force to answer this question.

In order to advise the Council, the Task Force should have examined the uses of guns and batons, the risk of injuries and death to subjects and officers involved, and compared that to the risk of OC use. The Task Force's investigation should have focused on the issue of whether 1) the risks (if any) to the average population are reasonable given the implementation of police protocols; 2) whether the risks to persons with disabilities are reasonable; and 3) whether the risks to everyone involved with OC use are greater or lesser than with guns or batons. If these risks are not reasonable, then OC use should be terminated. If they are reasonable, then OC use should be continued.

The Task Force, on the other hand, chose to ask only whether pepper spray is "safe" in the context of a health question. Since anyone who is not exposed to pepper spray is better off than anyone who is exposed, that answer is easy. But because OC poses a serious risk to persons that the Task Force majority designed its investigation to advocate the elimination of pepper spray.

Task Force members even admitted in one meeting that since their goal is to protect the health of the public, then we should eliminate the use of guns and batons as well. Indeed, if this Task Force had been asked to determine whether to ban all police weapons, the majority would have to conclude that all weapons should be banned, since they all cause injury of some kind.

But it is not and should not be the question asked. The question is whether police use of OC exceeds a reasonable risk of injury to any subject or the officers involved. The Task Force did not investigate this question, and the majority report does not consider it. Its recommendation is therefore irrelevant to the Council's decision.

The Task Force Failed to Find Any Evidence that OC Use is Less Safe than Guns or Batons When used In Compliance With Police Protocols

The Task Force attempted to locate medical researchers who could comment on the possible risks of pepper spray, and found none. It appears unlikely that such medical evidence will be available any time soon. At this point in time there is no evidence of any risk of long-term injury or death from exposure per se, but only when exposure is coupled with a lack of post-exposure follow-up. Berkeley police protocols includes follow-up care such as maintaining the subject in an upright position after exposure, immediate examination by medical personnel and transportation to medical facilities, also keeping the subject upright.

The Task Force located no evidence of any death or serious injury occurring when the protocols adopted by the Berkeley Police Department are used. The only instances of alleged injury or death outside of Berkeley have occurred when such protocols were not followed.

The only alleged injuries in Berkeley occurred in situations where the protocols were apparently not followed, either because the circumstances did not warrant the use of pepper spray under police guidelines, or because the subjects did not receive the follow-up care required by the protocols. The July 4, 1996 incident when pepper spray allegedly was used for crowd control may be an example of this situation. The Task Force heard testimony from a member of the public who was exposed to

police pepper spray while apparently attempting to flee the scene, and received no follow-up care by the police. He suffered no serious or long-term injury.

The Task Force viewed a video tape of Otis Stillwell's account of her OC exposure. Other accounts of the Stillwell matter which were not reviewed by the Task Force suggested that in that incident the police were surrounded by a large, angry mob which grew increasingly hostile and menacing. There are arguments that the use of pepper spray was inappropriate in those circumstances. Had pepper spray not been used, the officers would have had only two choices - guns or batons. While there is no reason to excuse any police misconduct involving OC or any other weapon, it is still useful to speculate on what could have happened to the public or to the officers had they not had pepper spray available.

The Task Force has also been provided evidence of alleged police misuse of OC in Berkeley and other locations. For example, in one recent incident, police officers in Eugene, Oregon are accused of attacking an individual with 12 canisters of OC. The Task Force majority's reaction is to condemn use in Berkeley because "If it can happen there, it can happen here." Yet the Task Force has no evidence about the training and protocols for Eugene, Oregon - or indeed, anything other than a sensational newspaper account.

From such "evidence," the Task Force majority concludes that OC should be banned in Berkeley.

The Task Force majority's tacit assumption is that OC is easy to use, so it is easy to misuse. The data from the police department actually shows the opposite - that OC is used rarely, and misuses minimal, and declining.

When confronted by that information, the Task Force majority concludes that the police are not using OC now because they are being watched carefully, or because they don't really need to use it. These are nothing more than rationalizations. The use of OC could be down because the officers are better trained, or they have had more experience in its use, or incidents justifying the use of OC have not occurred, or even because the public knows that officers carry and use OC as a deterrent. (The Task Force was presented with at lease one account of a subject readily surrendering to police after a prolonged physical struggle when the OC canister was just displayed.) And, if officers are using OC less because they are being watched, it is safe to say that if they are permitted to continue using OC, they will continue to be watched.

The Task Force majority has also speculated that OC use poses an increased threat of litigation. There is no support at all for this conclusion. Any action by police officer poses the threat of litigation. If any weapon is used, there is a potential for litigation. If the weapon was used in violation of guidelines, then the exposure to litigation exists. But since OC is a less violent and less traumatic weapon than a gun or baton, the resulting injury will be less, and pose a reduced threat of litigation, and a reduced exposure to damages. In fact, it may be possible for an individual injured by the use of a gun or baton to sue the City claiming that he would not have been injured if less violent means - OC - had been used.

Moreover, the Task Force majority has not carefully analyzed the source of its concern about possible police misuse. There is no serious dispute that the post-exposure protocols are effective in vastly limiting the chances of death or serious injury from OC. Even if police misuse occurs, the evidence

available to the Task Force shows that misuse, to the extent we can assume that misuse has occurred, usually happens in the exposure, the police choice to use pepper spray. Except for the July 4, 1996 incident, the violation of protocols does not seem to be in ignoring the post-exposure follow-up. Thus, even if misuse occurred in exposing a subject, that misuse would not result in serious injury or death because the post-exposure protocols would ensure proper care.

The Task Force Did Not Seriously Consider the Effect of a Ban on OC on Police Safety

The Task Force did not seriously evaluate how the availability of pepper spray to the police affects police safety. Logically, police officers who have had experience with OC are the best source of information on this topic, but the Task Force majority discounts their testimony entirely, apparently because they are interested in the outcome of the Council's decision.

The Task Force majority disregards the fact that we ask our police officers to risk their lives daily in our protection. The testimony and evidence available to the Task Force shows the strong desire of the individual officers to have OC available as an additional means of self defense is compelling. The world is not a safe place, and it is more dangerous for our police officers than to us. Their concern for their own safety and protection should be carefully considered by the Council.

Conclusion

There is a scarcity of relevant scientific information about OC exposure. From that majority concludes that the police should be prohibited from using pepper spray until or unless it is proven safe - meaning risk-free. That does the Council and the City a disservice. The majority simply sidesteps the real and difficult evaluation of the relative risks, which has not been addressed in any way by the Task Force majority.

The Council must decide whether the best result for the vast majority of people is great enough to justify the possible risks to an admitted few. The Task Force majority's report is not relevant to this decision since it failed to investigate the relative risks OC poses to persons with disabilities. Neither did the Task Force determine how many persons with disabilities might be subjected to OC versus those without disabilities, and how many persons with or without disabilities might suffer greater injury in the absence of pepper spray. The Task Force never considered the comparison between exposure to force by guns, batons and OC.

Only this type of analysis can answer the Council's question. It seems obvious and undeniable that more people would be exposed to far less risk by continued use of pepper spray than if OC use is discontinued. The Task Force majority's report does not show otherwise.

If the Council continues to consider banning the police use of pepper spray, then it should do so only on the basis of more careful study and analysis, which is probably not within the abilities of a citizen commission. The Council must disregard the Task Force's work as misdirected, even though well-meaning and well-intentioned. Instead, the Council should take the progressive, courageous stand favoring OC as a less violent, less traumatic, and more humane weapon.

Should the City Council prohibit the sale of Pepper Spray to the public?

No. It appears that such a ban is not legally possible. However, in order to prevent a greater level of violence, the exposure of the public to OC without the police protocols designed to prevent serious injury and death, and upon the advise of the police department, the Council should consider requiring warning labels and encouraging training for purchasers of OC.

FINANCIAL IMPACT:

None.

CONTACT PERSON:

Susan Burnett Luten, Pepper Spray Task Force, 548-5500

Approved by:

Susan Burnett Luten (mlf)
Susan Burnett Luten, Pepper Spray Task Force

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COUNCIL ACTION
September 9, 1997

To: Honorable Mayor and
Members of the City Council

From: Peace and Justice Commission

Subject: USE OF PEPPER SPRAY IN BERKELEY

RECOMMENDATION:

That Council approve the recommendations from the Pepper Spray Task Force majority regarding the use of pepper spray by the Berkeley Police Department and the general public.

BACKGROUND:

At the meeting of July 14, 1997, the Commission reviewed both the majority and minority reports from the Pepper Spray Task Force regarding the use of pepper spray by the Berkeley Police Department and the over-the-counter sale of pepper spray to the general public. After a discussion of the two reports, the Peace and Justice Commission approved the following motion:

M\S\C (Sherman, Ginger) That Council support recommendations 1, 2, 3, 4 from the Pepper Spray Task Force majority regarding the use of pepper spray by the Berkeley Police and the general public. Ayes: Unanimous; Absent: Bondoc, Tuma.

FINANCIAL IMPACT:

None.

CONTACT PERSON:

Michael Sherman, Chairperson, Peace and Justice Commission 548-4270
Manuel Hector, Secretary, Peace and Justice Commission 644-6080

Approved by:

Michael Sherman, Chairperson
Peace and Justice Commission

City of Berkeley

Police Review Commission
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FOR COUNCIL ACTION
September 9, 1997

To: Honorable Mayor and
Members of the City Council

From: Police Review Commission

Subject: ENDORSEMENT OF PEPPER SPRAY TASK FORCE'S RECOMMENDATIONS

RECOMMENDATION

That the City Council approve the recommendations of the Pepper Spray Task Force.

BACKGROUND

At its July 23, 1997 meeting, the Police Review Commission (PRC) voted unanimously to endorse the recommendations of the City of Berkeley Pepper Spray Task Force. (M/S/C: Ritchie/DeBose; AYES: DeBose, Handel, Martynn, Ritchie, Schlosberg; NOES: None; ABSTAIN: None; ABSENT: Bennett, Mar).

The issue of police use of Pepper Spray has a long history with the PRC. The Berkeley Police Department (BPD) first broached the subject of a new aerosol weapon Oleoresin Capsicum (Pepper Spray) with the PRC in February 1993. At that time the PRC expressed general approval but requested that the Department return with a Training Bulletin and specific criteria for the use of Pepper Spray.

In April 1993, the PRC, having received BPD Training and Information Bulletin #215 on the use of Pepper Spray (issued 3/24/93), voted to approve the use of Pepper Spray by the BPD. The Commission also requested, and the Department agreed, to make periodic reports on the use of Pepper Spray.

In December 1994, the PRC heard the case of Otis Stillwell, a Berkeley woman who was pepper sprayed by Berkeley police and who later collected a $75,000 settlement from the City

for the incident. The case raised questions for the PRC as to Pepper Spray's effectiveness and use by police.

In January 1995, the BPD reported that it was revising officer training in the use of Pepper Spray to take into consideration new information regarding the weapon. In July 1995, the PRC voted to request that the California Environmental Protection Agency set deadlines and enforce hitherto unmet requirements for completed research into the health risks of Pepper Spray. In September 1996 the BPD issued Training Bulletin #216 which, with input from the Commission, revised Pepper Spray training and policy. In October 1995, the PRC requested that the BPD report to the Commission within six months regarding the use of Pepper Spray pursuant to the newly adopted BPD policy.

During the Spring of 1996, the following events occured which drew attention to police use of Pepper Spray: (1) Several deaths occurred in the Bay Area in incidents where police used Pepper Spray, and (2) an influential FBI report regarding Pepper Spray was discredited when a key FBI official was reported to have illegally received money from one of the manufacturers. In March 1996, the PRC received a petition filed by over 50 citizens requesting a public hearing on the issue of police use of Pepper Spray. On May 22, 1996 the Commission held a public hearing during which the issue of Pepper Spray use was debated.

In June 1996, PRC again considered the issue of Pepper Spray use and heard 42 members of the public speak on the issue. The Commission adopted the following motion:

"That the Police Review Commission notify the City Council and City Manager and recommend to the Chief of Police that, in light of new medical information regarding the effects of Pepper Spray, that the use of Pepper Spray by the Berkeley Police Department be suspended until the Berkeley Police Department reviews this new information and returns (within 60 days) to the Police Review Commission with recommendations for the modification in the Departments' use of Pepper Spray."

In response to this request and actions by other City Commissions, Council set up the Pepper Spray Task Force to study the implications of the use of Pepper Spray by the BPD and by the public. After months of hearings and deliberations, the Task Force issued a final report recommending, among other things, that the use of Pepper Spray by the Berkeley Police Department be suspended until the product is found to be safe.

After studying the Task Force's final report and the accompanying minority report, the Commissioners voiced their opinions that the final report demonstrated that the Task Force had thoroughly researched and considered the subject. The report demonstrates that the potential medical consequences and health effects of exposure to Pepper Spray to Berkeley citizens are too significant to ignore.

The report also highlights serious questions regarding the effectiveness of Pepper Spray. This is a serious matter as police officers may rely on this weapon to their detriment. We will not repeat all the conclusions and recommendations of the final report here. The Commission feels, however, that this subject requires and has received serious thought. The Commission

strong urges that the City Council accept the recommendations of the Pepper Spray Task Force as being in the best interests of the citizens and police officers of Berkeley.

FINANCIAL IMPLICATIONS:

None.

CONTACT PERSONS:

Aaron Handel, Chair, Police Review Commission	644-6716
Daniel J. Smith, Police Review Commission Officer	644-6716

Approved by:

Aaron Handel, by DJS
Aaron Handel, Chairperson
Police Review Commission

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COUNCIL ACTION
September 9, 1997

To: Honorable Mayor and
Members of the City Council

From: James Keene, City Manager

Subject: RESPONSE TO PEPPER SPRAY TASK FORCE REPORT

RECOMMENDATION:

That Council not implement the recommendations of the Task Force for the reasons that are articulated below. Additionally, it is the opinion of the City Attorney that the City does not have authority to regulate the sale and use of pepper spray within the City limits.

BACKGROUND:

After a thorough review of the report from the Pepper Spray Task Force, we are in substantial disagreement with the findings. We find that the report of Task Force member Susan Luten more adequately represents the needs of the community, the men and women of the Berkeley Police Department, and the concerns of management staff.

Because the Police Department must be concerned about the welfare of **all** citizens of the community, it is imperative that we put forth the best argument possible for the retention of pepper spray. Like any less-than-lethal weapon, there are always going to be risks inherent with its use. As a practical matter, any weapon, if used improperly, can result in serious injury. A police officer's job is to minimize the risk and make the difficult decisions as to which weapons are the most appropriate for a particular situation and yet provide the lowest potential for causing bodily injury to a resisting suspect.

FACTUAL SUMMARY

The Berkeley Police Department began issuing Oleoresin Capsicum (pepper spray) to officers to replace chemical mace in mid-1993. Since its introduction, there have been thirty-eight documented instances of officer use and citizen exposure. Pepper spray has never been used more than ten times in one calendar year, and only five times so far in 1997. Thirty-seven men and one woman were exposed to the spray in the incidents reported. They ranged from eighteen to sixty years of age, with most being between their mid-twenties and their mid-forties. Thirty-four of the incidents involved violent or bizarre behavior ending up in a physical struggle with the police officer. The pepper spray was reported to be ineffective thirteen times (35%) of the time.

Drugs and/or alcohol use was reported in fourteen of the events requiring pepper spray intervention. Follow-up care protocols require the officer to bring the sprayed subject out into the fresh air, to flush the eyes with cool water, and to apply soap and water to other areas of the skin that may have been impacted. Correct restraining techniques which require officers to ensure that prisoners are not placed in positions that could lead to positional asphyxia also help to reduce the potential for harm to the sprayed subjects. Sprayed subjects are also treated at the scene by paramedics and provided appropriate medication and or drugs to alleviate pain. The subjects are then transported to a hospital for further medical evaluation prior to incarceration. As a result no deaths or verified serious injuries related to pepper spray use have occurred in Berkeley.

SELF DEFENSE CONCERNS

Removing pepper spray from the police department's "force continuum" will undoubtedly imperil both police officers and the community. There is no other available alternative short of baton strikes or gunshot that will allow officers and the community to remain safe from violently resisting subjects. Rather than use these options, many officers will opt to physically struggle with the suspect with many more potentially dangerous consequences for the officer, the resisting subject, and the community. Another scenario not considered by the Task Force is the threat of multiple suspects. Unlike the baton, pepper spray is an excellent deterrent for officers faced with two or more adversaries, and may well be the only reasonable less-than-lethal force for smaller police officers faced with this situation. If pepper spray is taken away, the only real alternative will, almost certainly, become the handgun.

The Task Force report refers to mace as a safer less-than-lethal weapon with no supporting data to substantiate this claim. To our knowledge, there is no data that says mace is less likely to cause respiratory distress than pepper spray. From our own experiences at the Police Department we do know that mace is NOT an effective less-than-lethal weapon. The Task Force went to great lengths to show that pepper spray is not always effective. Our officers know that (see statistics above) and are trained for that possibility. There is no weapon, chemical or otherwise, that is fail-safe. The potential for failure with any weapon is always there, and the officer is trained to always consider what the secondary plan should be. It is our experience, however, that pepper spray is many times more effective than mace ever was. Even more, just the mere threat of the possible use of pepper spray often serves the purpose of obtaining the compliance that the officer sought in the first place.

HEALTH CONCERNS

Certainly, we could argue for many months as to the validity of many of the statements made by the Task Force in the Pepper Spray report. However, we do not feel that would be productive and would only serve to fan the flames of an already contentious issue. It is safe to say, however, that there is wide disagreement among the experts about how safe this product is for the general public. The Task Force was shown reports from the California Environmental Protection Agency, the United States Army, the National Institute of Justice, the Federal Bureau of Investigation, the pepper spray manufacturers, the International Association of Chiefs of Police, the California Department of Justice and several others which detail the risks of the product, but also acknowledge that when applied by trained law enforcement personnel with appropriate mitigation procedures, that it offers an effective less-than-lethal force alternative for law enforcement.

In essence, the major problem that the Pepper Spray Task Force had with oleoresin capsicum is that it has not been proven to be safe. While that statement is unarguably true, it is also undeniable that the alternatives available to police officers -batons and firearms - are even less safe, and have serious and often fatal consequences. Pepper spray presents a far more humane option for taking resistive subjects into custody. In the vast majority of recorded incidents where pepper spray has been used by law enforcement in this state (and, indeed, nationally) there have been no injuries to either the officer or the subject. The California Department of Justice reported in March 1996, that in over 23,000 uses of pepper spray in California there were five (.0002%) people injured as a result of pepper spray use.

The City of Berkeley Health officer, Dr. Poki Namkung, supports the continued use of pepper spray with strict adherence to established protocols, including a specific ban on the use of oleoresin capsicum in crowd control situations.

LEGAL CONCERNS

One of the major omissions of the Pepper Spray Task Force report is a description of the mitigation that the police department has put in place to insure the safety of those who are exposed to pepper spray. Our research of the issues surrounding in-custody deaths has shown that the major causes are positional asphyxia, cocaine abuse and toxicity, cocaine-induced delirium, and neuroleptic malignant syndrome. The Police Department has attempted to deal with these issues through a Training and Information bulletin (No. 234, dated 8/23/95), that states in part,

> "During the autopsies performed after in-custody sudden deaths, no evidence of these four syndromes is discovered other and than the presence of cocaine and evidence of heart attack. Often the only usual signs noted by the pathologist may be the bruises found on the body of the in-custody, which resulted from the struggle during the arrest.
>
> It is important that all Berkeley Police Department personnel understand that pre-existing risk factors, combined with these subjects body position when subdued or in transit, can compound the risk of a sudden death. "

In short, post-spraying care of the subject is a crucial part of our training so that we can ensure, to the best of our ability, that we don't have any "sudden in-custody deaths" in Berkeley.

The Task Force report states that "the continued use of pepper spray by the BPD (is) an acute financial liability to the City of Berkeley". The reality is that there has been one lawsuit filed against the Police Department over the use of pepper spray in over 4 years of use. That lawsuit was settled out of court for a total of $75,000. Perhaps the more difficult questions are how many more lawsuits will be filed against the City if pepper spray is taken away and other more damaging weapons are then used against a person instead? How many more use of force complaints will be filed against the Department? How many more officers will be injured and file Workers Compensation claims as result of those injuries? How many more members of our community will come to harm because officers are unable to protect them with an appropriate less-than lethal weapon? These are the balancing questions not addressed by the majority's report.

SUMMARY

The difficulty with the proposed ban on the use of pepper spray is that the Task Force has made no recommendation for a viable less-than-lethal alternative for our police officers. In thousands of jurisdictions throughout the country, pepper spray has proven to be an effective, less-than-lethal method for subduing physically violent subjects. Many law enforcement agencies have reported a lower need for "use of force" since they switched to pepper spray, since subjects seem much more inclined to give up without a fight than suffer the consequences of being sprayed with pepper spray. The proper, controlled use of pepper spray has not only reduced the number of violent confrontations between the police and public, but it has also helped to disprove the pervasive myth that physical strength and prowess are central to modern policing. As a result, we have been able to hire a more diverse work force that is greatly reflective of the public we serve.

A ban on pepper spray use will make Berkeley Police officers the only citizens of this state who are not legally authorized to carry the spray. Ironically, they may be the most knowledgeable, best-trained group providing the best after exposure care of any pepper spray-carrying individuals in the state.

The Police Department has worked with the Police Review Commission and the Pepper Spray Task Force, and will continue to do so in the future, in an effort to develop a strong pepper spray policy that is responsive to the legitimate concerns expressed in the Task Force report and the law enforcement needs of our community. The factual history of Berkeley Police Department use of pepper spray demonstrates that it has been used safely, prudently and under controlled circumstances. It is our belief that the continued use of pepper spray, combined with well-written policies that clearly delineate the appropriate times, places and post-exposure care for pepper spray use, and strong supervision by management, is the most prudent decision. We urge the Council to reject the recommendations of the Pepper Spray task force and not jeopardize police officers in performing their most difficult job.

As supporting documentation we have attached the following documents:

- April 3, 1997 letter to Mayor Shirley Dean from the National Center for Women and Policing
- July 25, 1997 memorandum from Dr. Poki S. Namkung to Chief D. E. Butler
- Oleoresin Capsicum Usage reports, California Department of Justice, March, 1996

- October 22, 1996 memorandum from City Attorney Manuela Albuquerque to Dan Silva of the Police Review Commission on City Authority to Regulate Sale and Use of Pepper Spray

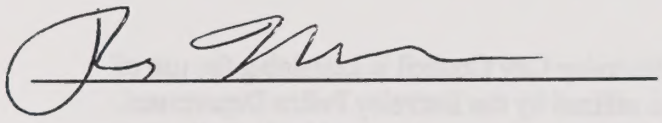
FINANCIAL IMPACT:

None.

CONTACT PERSON:

D. E. Butler, Chief of Police, 644-6568

Approved by:



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Compton Police Department

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Western Regional Counsel, NAACP Legal Defense Fund, Inc.

ELKE L. SCOTT, PH.D.
School of Criminal Justice, University of Central Florida

ELEANOR SMEAL
President, Feminist Majority Foundation

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National Coordinator, Feminist Majority Foundation

STEVEN J. STANARD PH.D.
CEO Stanard & Associates, Inc.

ASSISTANT CHIEF ROBERTA WIMMER
Portland Police Bureau

April 3, 1997

Mayor Shirley Dean
City of Berkeley
2180 Milvia Street, 5th Floor
Berkeley, CA 94710

Dear Mayor Dean:

It has come to our attention that the Berkeley City Council is examining the use of OC spray as a less-than-lethal weapon utilized by the Berkeley Police Department. The *National Center for Women and Policing* urges you to provide the Police Department with effective less-than-lethal methods for subduing physically violent suspects. The use of OC spray and other similar methods will not only reduce violent confrontations, but also help expose the pervasive myth that physical strength and prowess are central to effective policing. This, in turn, will make the job more accessible to women.

National studies show that increasing the numbers of women police measurably reduces police violence and improves police effectiveness, especially in response to violence against women. Yet, women police are constantly viewed as not being physically strong enough to do the job—despite many studies that disprove that myth. The ability of police officers to use an important tool such as OC spray removes the "strength" argument from those who would keep policing as a male endeavor.

In February, 1997, a study was released by the National Institute of Justice that reported on the findings of OC use in the Baltimore County Police Department. That study found that OC spray was effective in 90% of the incidents where it was used. Injuries to suspects occured in only 8% of the incidents and none of the suspects were injured seriously enough to require hospital treatment. Officers reported minor injuries in 12% of the encounters, but none of them lost work days because of the injuries. In addition, use-of-force complaints decreased by 53% and no complaints were made about the use of OC spray.

A DIVISION OF THE FEMINIST MAJORITY FOUNDATION
8105 WEST THIRD STREET, LOS ANGELES, CA 90048 * 213 651 2532 * FX 213 653 2689

We believe it is clear that when properly used, OC spray is an effective tool for law enforcement and one that supports women in law enforcement. We urge you to take these factors into consideration when making your decision.

If we can be of further assistance to you, please feel free to call us.

Sincerely,

Penny E. Harrington

Penny E. Harrington
Director

04-07-1997 14:28 213 6532689 FFM LA P.03
Received: 4/ 7/97; 15:04; 213 6532689 => BERKELEY POLICE DEPT; #3

CITY OF BERKELEY

Memorandum

DATE: July 25, 1997

TO: DASCHEL BUTLER,
Chief, Police Department

FROM: POKI STEWART NAMKUNG, M.D., M.P.H., PSN
Health Officer

SUBJECT: **RESPONSE TO PEPPER SPRAY TASK FORCE REPORT**

I have reviewed the Pepper Spray Task Force Report, dated September 9, 1997; the Pepper Spray Task Force Minority Report, June 28, 1997; as well as the materials provided to the Pepper Spray Task Force during their deliberations.

In order to adequately critique the recommendations of both reports, the context in which pepper spray (OC) is used by the Berkeley Police Department (BPD) must be fully understood:

1). OC is used as a defensive weapon in situations where a police officer determines that other non-lethal methods of control are ineffective and that immediate harm may result to the police officer if no further escalation of force is employed in order to protect the life and safety of said police officer/s.

2). The city of Berkeley is an intensely urban, densely populated area with more than its share of societal problems, in the forms of homelessness, prevalence of violent and non-violent crime, and populations affected by poverty, substance abuse, and mental illness.

3). Despite this difficult environment, the Berkeley Police Department maintains a stellar record of responsiveness to community concerns. There are very few police departments who have the commitment to programs and services to prevent crime and social disorganization as does the BPD. Their record of crime resolution, arrest and conviction in comparison to complaints of police brutality and lack of protocols or the lack of adherence to protocols is probably unmatched in the United States.

4). Finally, the environment of the United States as a whole must be considered when assessing information in the majority task force report. The United States has the highest rate of gun ownership in the world by far. It also has the highest rate of deaths to police officers in action, especially if deaths due to terrorist activities are eliminated from the equation. To compare Australia and Great Britain, both countries where neither the majority of the citizenry or the police are armed with handguns or assault weapons, is irresponsible in light of this knowledge.

To answer to the query, "Is pepper spray safe?" the context of use must be understood. First, in isolation, there is no dispute that pepper spray has the potential to cause long term injury and perhaps death in certain people with respiratory or cardiac disabilities. However, it is clear that for the majority of people, OC would be a non-lethal instrument of force. The assertion of potential carcinogenicity or mutagenicity is a non-starter, simply because a single incident of exposure will not provoke these effects. All of the materials named as propellants are commonly used in other products easily accessible to the public. The active ingredient is available in many over-the-counter, herbal and prescription products as well as any hot pepper or hot pepper food product. To place this discussion in perspective as to relative risk, the use of common hair spray (pre-ban on fluorinated hydrocarbons) might cause the exact same effects as attributed to OC, i.e. corneal injury, respiratory difficulty and other toxic and allergic reactions.

To assess the lethality of OC in its actual context of use by the BPD, the discussion must involve a consideration of the relative risk of OC to people with disabilities in comparison with the known risks to health of batons and guns as used to subdue an attacker. Common sense would dictate that these more lethal weapons would impose a greater risk of serious injury and death.

The alternatives proposed by the majority report: use of other less dangerous materials, adequate cover, and training in defensive tactics should be addressed. Should other less dangerous materials become available, the BPD is encouraged to include them in their Use of Force Continuum after proper review. At present, those materials do not exist. The suggestion of adequate cover is compromised by the actual situations in which OC is used by the BPD; that is, the assessment of immediate harm to police officer/s without adequate back-up. If the BPD could predict in advance every potential dangerous situation, they are certainly organized enough to provide adequate cover. However in reality, most police officers patrol alone. Last, training in defensive tactics certainly already occurs. What might be needed though is training in offensive tactics. Should we require every officer in the BPD be proficient in the martial arts? Certainly then, an assessment should then be made of the potential lethality of this method of subjugation in comparison with other available weapons.

The discussion of the efficacy of OC in the majority report is largely based on anecdote, theoretical report, case study, and analysis of four BPD police reports. What is missing is testimony from police officers who have actually been in the position of using OC. To say that the police may be entertaining a false sense of security in their dependence upon OC is presumptuous at best and life-threatening at its worst. Police and firefighters are the civil servants who place their lives in jeopardy for the sake of protecting the public. It is their assessment of the value of OC that should outweigh any secondary assessment of its use.

If one reads the entire majority report of the Pepper Spray Task Force, one can only surmise that the end of the final recommendation is missing. If one accepts the conclusions step-by-step, one realizes that OC is lethal, ineffective, dangerous to police officers themselves, and a potential financial liability and therefore its use by the BPD must be ended immediately "and only the use of batons and/or guns should be used to

subdue violent and threatening offenders." This is the logical follow-through of their conclusions in the reality of police practice.

RECOMMENDATIONS:

1). Support the continued use of OC by the BPD with strict adherence to already established protocols.
2). Strict monitoring and continuous review of the use of OC with stated consequences for the violation of protocols including intensive retraining and disciplinary measures.
3). Inclusion in the established protocols of a definitive statement banning the use of OC for crowd control.

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE
BUREAU OF CRIMINAL INFORMATION
AND ANALYSIS
P.O. BOX 820200
SACRAMENTO, CA 94203-0200
(916) 227-2222

OLEORESIN CAPSICUM (OC) USAGE REPORTS

SUMMARY INFORMATION
MARCH, 1996

Number of Reports to Date:	23,095
Number of Reporting Agencies:	518
Production Application Information	
Number of Agencies Reporting Cap-Stun Usage	91
Number of Agencies Reporting Def-Tec Usage:	697
Reported Effective:	18,610
Reported Ineffective:	2,687
Percent Effective:	87%
Subject Information	
Overall Average Age:	31 years old
Male Subject Age Range:	9-89 years old
Female Subject Age Range:	12-81 years old
Number of Male Subjects Reported:	21,006
Number of Female Subjects Reported:	1,685
Number of Male and Female Together:	45
Number of Dogs Reported:	209
Unknown:	249
Subjects Reported Not Injured:	20,278
Subjects reported Injured (due to altercation, no OC):	2,131
Subjects Injured due to OC:	5
OC Related Deaths:	0
Death resulting from Greater Means of Force (i.e., gunshot):	9
Law Enforcement Personnel Information	
Officers Reported not Injured:	20,534
Officers Reported Injured:	1,694
Officer Reported Injured due to OC:	1

*Formal independent analysis by the International Association of Chiefs of Police (IACP) indicates that OC was **not** the cause of death in the 14 cases where individuals died after application of OC.*

Subsequent to the IACP study, _____ Additional in-custody death reports (in which OC was used) have been received.

CITY OF BERKELEY

DATE: October 22, 1996 Memorandum

TO: DAN SILVA, Secretary, Police Review Commission

FROM: MANUELA ALBUQUERQUE, City Attorney
ZACH COWAN, Assistant City Attorney

SUBJECT: **OPINION: CITY AUTHORITY TO REGULATE SALE AND USE OF PEPPER SPRAY**

This responds to your opinion request of October 3, 1996, a copy of which is attached.

ISSUE

Does the City have authority to regulate the sale and use of "pepper spray" within the City limits.

CONCLUSION

No.

DISCUSSION

A. Statutory Background

Since 1953 the state has regulated the sale, possession and transportation of "tear gas weapons" (Pen. Code §12400 *et seq.*), including *oleoresin capsicum* ("pepper spray"). (Pen.Code §12401; People v. Autterson (1968) 261 Cal.App.2d 627.)

1. Original Regulatory Framework

Until relatively recently, the state statutory scheme generally prohibited the sale possession and transportation of tear gas weapons, except as permitted by the Department of Justice, subject to limited exemptions for peace officers, military and naval forces, federal law enforcement officers and some others. (Pen. Code §12420, §12403.1, §12403.5, §12403.6 [repealed].)

Section 12403.7 established a detailed scheme for regulating the sale and use of tear gas weapons to persons not otherwise exempted, for self-defense. Section 12403.7 required that purchasers complete a course certified by the Department of Justice prior to purchasing any tear gas weapon (subd. (a)(6)(A)), and made unauthorized use of a tear gas weapon a crime (subd. (a)(8)).

Section 12420 also prohibited the sale, possession and transportation of tear gas weapons in California, subject to permit systems administered by the Department of Justice for (1) transportation and possession (Pen. Code §12423 *et seq.*) and (2) sale (Pen. Code §12435 *et seq.*)

Finally, tear gas weapons themselves were subject to certification of acceptability by the Department of Justice. (Pen. Code §12450 *et seq.*) For purposes of this requirement, "acceptable" was defined with respect to the safety and effectiveness of a product, the hazard inherent in its use and the manner in which it could be expected to be used. (Pen. Code §12451.)

2. Recent Amendments

In 1993 and 1995 the Legislature substantially amended the statutory framework for regulating the sale and use of tear gas weapons.

In 1993 the Legislature made two primary amendments. First, it eliminated the ability of the Department of Justice to promulgate regulations regarding tear gas weapons (Stats. 1993, ch. 954, see, Pen. Code §12403.7.) Second, and more significantly, it added a new section 12460 which specifically permitted "any person who is otherwise in compliance with this chapter" to "purchase, possess, or use tear gas, or a tear gas weapon, in which the active ingredient is oleoresin capsicum." (Former Pen. Code §12460.) This amendment was apparently intended to permit persons who were otherwise allowed to use tear gas weapons to possess and use pepper spray, as long as the specific product had been certified as acceptable by the Department of Justice. (Id. Legislative Counsel's Digest.)[1]

In 1995 provisions for the permitting and licensing of the sale of tear gas weapons (Pen. Code §12435 *et seq.*) were repealed in their entirety, and provisions regulating transportation and possession (Pen. Code §12423 *et seq.*) were limited to tear gas weapons not sold for self defense. The requirement that tear gas weapons be certified as acceptable by the Department of Justice (Pen. Code §12450 *et seq.*) was also repealed. (Stats. 1995. ch. 437.)

In sum, the Legislature largely "deregulated" the use of tear gas weapons for self-defense.

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[1] So interpreted, the amendment did not actually change the law, since persons in compliance with the law could already purchase and use pepper spray. However it did make clear, if only by implication, that pepper spray was a form of tear gas.

B. May the City Regulate the Sale and Use of Pepper Spray?

The police power granted the City by Article XI, section 7 of the state constitution is "as broad as the police power exercisable by the Legislature itself". (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 140; see also, Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 293.) However, local regulation which conflicts with state law is preempted and of no effect unless the subject of the regulation is a municipal affair. (Bishop v. City of San Jose (1969) 1 Cal.3d 56, 61.)

The first question is thus whether local regulation of the sale and use of pepper spray would conflict with state law. If it would, then the second question is whether the regulation of pepper spray is a municipal affair.

1. Local Regulation of the Sale and Use of Pepper Spray Would Conflict with State Law

A local regulation conflicts with state law if it duplicates, contradicts or enters a field which is fully occupied by state law. (People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal.3d 476, 484.)[2]

a. Duplication of State Law

Penal Code section 12403.7 addresses:

1. who may purchase and possess pepper spray (Pen. Code §12403.7(a)(1)-(4));
2. container capacity and labelling (Pen. Code §12403.7(a)(5)(A)-(D) & (6)); and
3. how it may be used (penalties for use not in self-defense or against a peace officer). (Pen. Code §12403.7(a)(7).)

To the extent a local regulation contained substantially similar restrictions, it would duplicate-- and therefore conflict with-- provisions of state law.

b. Contradiction of State Law

State law expressly authorizes "any person" to "purchase, possess, or use tear gas and tear gas

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[2] Because local regulation would almost certainly either duplicate or contradict state law, we do not consider whether the Legislature has fully occupied the field.

weapons... solely for self-defense", subject to the limitations set forth in section 12403.7. This authorization is "notwithstanding any other law". (Pen. Code §12403.7(a).)

To the extent that local restrictions on the sale or use of pepper spray limited the sale, possession or use of pepper spray more than section 12403.7 does, they would contradict state law, because they would prohibit what the Legislature intended to authorize. (Northern California Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90, 105-106.)

2. Regulation of the Sale and Use of Pepper Spray is a Matter of Statewide Interest, and Local regulation Would Therefore Be Invalid.

Even if a charter city's regulation conflicts with state law, however, it is not invalid if it deals with a "municipal affair" and is not a subject of statewide interest.

a. The City's Home Rule Powers and the "Municipal Affairs" Doctrine

Article XI, section 5(a) of the California Constitution provides:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

In California Federal Savings & Loan Ass'n. v. City of Los Angeles (1991) 54 Cal.3d 1, the Supreme Court "analyzed various cases decided under article XI, section 5, subdivision (a), and concluded that they 'reject a static and compartmentalized description of "municipal affairs" in favor of a more dialectical one. Out of these cases emerges the counterpoint of "statewide concern" as a conceptual limitation on the scope of "municipal affairs" and thus on the supremacy of charter city measures over conflicting legislative enactments.'" (Johnson v. Bradley (1992) 4 Cal.4th 389, 398; see also, California Federal, supra, 54 Cal.3d at 16 [" 'No exact definition of the term "municipal affairs" can be formulated and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case.' "].)

The Court then articulated a framework for resolving municipal-affairs and statewide-concern

questions under article XI, section 5(a).

> When the local matter under review "implicates a 'municipal affair' and poses a genuine conflict with state law, the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted. If the subject of the statute fails to qualify as one of statewide concern, then the conflicting charter city measure is a 'municipal affair' and 'beyond the reach of legislative enactment.' ... If, however, the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related [and 'narrowly tailored'] to its resolution, then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by article XI, section 5 [, subdivision] (a), from addressing the statewide dimension by its own tailored enactments."

(Johnson v. Bradley, supra, 4 Cal.4th at 399, quoting California Federal, supra, 54 Cal.3d at 17.)

However,

> ...the phrase "statewide concern" is thus nothing more than a conceptual formula employed in aid of the judicial mediation of jurisdictional disputes between charter cities and the Legislature, one that facially discloses a focus on extramunicipal concerns as the starting point for analysis. By requiring, as a condition of state legislative supremacy, a dimension demonstrably transcending identifiable municipal interests, the phrase resists the invasion of areas which are of intramural concern only, preserving core values of charter city government.

(Id.)

The dispositive issue is the identification of a "convincing basis for legislative action originating in extramural concerns". (California Federal, supra, 54 Cal.3d at 18.)

> If [a] state statute qualifies as a statewide concern, we next consider whether it is both (i) reasonably related to the resolution of that concern, and (ii) "narrowly tailored" to limit incursion into legitimate municipal interests.

(California Federal, supra, 54 Cal.3d at 17.)

> If it meets this final test, "then... the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments."

(Id.)

b. Local Regulation of the Sale and Use of Pepper Spray Is a Matter of Statewide Interest.

The first issue in an analysis of whether the City may regulate the sale and/or use of pepper spray is whether such regulation is a "municipal affair" under article XI section 5(a). Although there are no bright line tests under this section, we will assume for the purposes of this opinion that the protection of public safety is a municipal affair, and that this includes the regulation of weapons, including tear gas weapons.

The next and final issue is whether the regulation of weapons, and in particular the Legislature's policy decision striking a balance between allowing weapons to proliferate in society and making them available for self-defense, is a matter of statewide concern. For the reasons that follow, we conclude that it is, and therefore that local regulation of pepper spray would be invalid.

In order to analyze whether the state's statutory framework for regulating tear gas weapons addresses a matter of statewide concern and therefore preempts local regulation, it is necessary to determine whether there is a "convincing basis for legislative action originating in extramural concerns". (California Federal, supra, 54 Cal.3d at 18.)

Part Four of the Penal Code, "Prevention of Crimes and Apprehension of Criminals" consists of 12 titles, of which Title 2 is "Control of Deadly Weapons". Title 2 contains 11 chapters, regulating various kinds of weapons, ammunition, explosive devices, boobytraps and body armor, including "tear gas weapons". (Ch. 4.) As described above, until its recent amendment, Chapter 4 regulated the possession, transportation, sale and use of tear gas weapons in California, beginning with the requirement that the specific substance by certified as acceptable and extending through imposing penalties for its improper use.

Although in Chapter 4 does not explicitly articulate the statewide concern that it addresses, it is clear that the Legislature's purpose in enacting and amending Chapter 4 generally relates to protecting public safety by striking the appropriate balance between preventing and controlling the sale, possession and use of tear gas weapons and allowing their use for self-defense. Recently, the Legislature has altered the balance it previously struck by making tear

gas weapons more available for purposes of self-defense.

On the other hand Berkeley may well have an interest in limiting the proliferation of dangerous weapons in Berkeley, in order to protect its citizens and law enforcement personnel. In effect, as an urbanized area, the City may wish to strike a different balance between controlling proliferation of weapons and enabling self-defense than might be appropriate in a rural area.

Although we cannot predict with certainty how a court would rule, we conclude that local regulation of the sale or use of pepper spray is preempted and would be held invalid for the following primary reasons.

First, the purpose of local regulation would presumably be to alter the balance struck by the Legislature between proliferation of weapons and self-defense. While the courts recognize that "every municipality is unique"[3] and that cities may need to adopt local regulations that differ from those adopted by the Legislature, the cases upholding such local regulations in the face of statewide legislation have generally addressed local regulations which did not directly conflict with statewide regulatory schemes, but supplemented them in other areas. For instance, in Cohen v. Board of Supervisors, the Supreme Court upheld a local law for the licensing of escort services because it merely supplemented state legislation prohibiting criminal conduct by employees of escort services, although it struck down provisions which similarly prohibited illegal conduct by escort service employees. (Cohen v. Board of Supervisors, supra, 40 Cal.3d at 292.) Here, we presume that local regulation of pepper spray would directly interfere with the ability of persons otherwise permitted under section 12403.7 to purchase and use pepper spray.

Second, pepper spray and other tear gas weapons are small and easily transported. For this reason local regulations limiting their sale or use would not only be of limited utility, but

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[3] "The state in its law deals with all of its territory and all of its people. The exactions which it prescribes operate ... upon the people of the state, urban and rural, but it may often, and does often happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities; so that it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements." (Cohen v. Board of Supervisors, supra, 40 Cal.3d at 298, quoting In re Hoffman (1909) 155 Cal. 114, 118.)

would also affect transient individuals.[4] Moreover because of their transportable nature, weapons, including tear gas weapons, are particularly suited to regulation on a statewide basis.

Finally, the Legislature has clearly shown its intention to make pepper spray and other tear gas weapons more available for self-defense, rather than less available, presumably in order to help deter or prevent crime throughout the state. The deterrence and prevention of crime are clearly issues of statewide concern, and while in some respects they are amenable to differing local solutions, the larger policy decision of how to balance the proliferation of weapons with the need for self-defense is not dependent on local conditions.[5]

C. Conclusion

While it is impossible to predict with certainty how a court would rule, we believe that it is more likely than not that a court would find that local regulation of pepper spray is preempted, and that because Chapter 4 addresses a matter of statewide concern it prevails

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[4] "If the ordinance were in substance a criminal statute which attempted to prohibit conduct proscribed or permitted by state law either explicitly or implicitly, it would be preempted. In In re Lane, supra, 58 Cal.2d 99, for example, this court invalidated an ordinance which made it a crime for persons not married to each other to resort to numerous specified places for the purpose of engaging in sexual intercourse or participating in a lewd act. (Id., at p. 102.) The court noted that certain types of sexual activity had been proscribed by the Penal Code, but that 'neither simple fornication nor adultery alone nor living in a state of cohabitation and fornication has been made a crime in this state.' (Id., at p. 104.) The omission of these activities from state law could reasonably be construed to indicate a legislative intent to permit them, thereby preventing municipalities from rendering them criminal. (Id., at pp. 104-105.)" (Cohen v. Board of Supervisors, supra, 40 Cal.3d at 293.)

[5] In this respect the case of Northern California Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90 is analogous. That case held that a state statutory scheme which conferred on individuals the right to elect to undergo electroshock therapy preempted and invalidated a local ordinance prohibiting such treatment in Berkeley. Similarly here, Chapter 4 confers on all qualified individuals the right to purchase and use tear gas weapons for self-defense.

over local regulation of pepper spray.

Respectfully submitted,

MANUELA ALBUQUERQUE
City Attorney

By: ZACH COWAN
Assistant City Attorney

ZC:pab

Attachment

cc: City Clerk, w/attach.

Index: I.F.1.; V.A.; V.H.7.

City of Berkeley

Police Review Commission
2121 McKinley Avenue
Berkeley, California 94704

(510) 644-6716 • FAX: (510) 644-6679

RECEIVED
OCT 7 - 1996
CITY ATTORNEY

TO: Manuela Albuquerque, City Attorney

FROM: Dan Silva, PRC Officer
Police Review Commission

SUBJECT: Sale and Use of Pepper Spray in Berkeley

DATE: October 3, 1996

The Police Review Commission at its regular meeting of September 25, 1996 moved and passed the following motion;

> "That a letter be sent to the City Attorney asking whether the City of Berkeley has the authority to regulate the sale and use of 'Pepper Spray' within its city Limits."

The motion was moved by Commissioner Canavan and seconded by Commissioner Handel M/S/C/ with a no vote by Commissioner Rivera.

If you have any questions or concerns regarding this communication or your anticipated response please feel free to contact me at your earliest opportunity.

City of Berkeley

City Manager's Office
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

(510) 644-6580

RECEIVED AT
COUNCIL MEETING OF:

SEP 09 1997

OFFICE OF THE CITY CLERK
CITY OF BERKELEY

COUNCIL INFORMATION
September 9, 1997

To: Honorable Mayor and
Members of the City Council

From: James Keene, City Manager

Subject: COMPARISON OF PEPPER SPRAY AND MACE

In response to several questions by members of the City Council, we have prepared a brief summary report on the major differences between pepper spray and mace. The report was extracted from a research paper prepared by the International Association of Chiefs of Police in February, 1997.

Chemical Weapon Use in Law Enforcement

For centuries, various forms of chemical agents have been used in war as offensive weapons. After World War I, however, an interest in extending the use of chemicals into the realm of law enforcement emerged. It was hypothesized that these agents could control criminals and riotous crowds as effectively as they controlled enemies during warfare. The three chemicals - chloroacetophenone, o-chlorobenzylidene malononitrile and oleoresin capsicum - that have been used in law enforcement have shown major practical differences.

Chloroacetophenone (CN) is a powerful lacrimator and respiratory irritant. Exposure to CN causes copious, uncontrollable tearing; difficult, shallow breathing, chest tightness; stinging sensations on the skin; and nausea. Psychological effects of fear and panic may also occur. As an irritant that relies on pain compliance, CN is most effective on those individuals who are lucid and have a normal pain threshold. Individuals who are intoxicated, extremely agitated, or mentally ill generally are less effected by the agent because of their greater tolerance for pain.

Although humans are susceptible to the agent's effects, animals suffer little, if at all, from the symptoms induced by CN. In addition, CN effectiveness is temperature dependent. While the agent is useful in any temperature over 50 degrees F, it is most effective when used in temperatures of 72 degrees F or higher

CN also creates decontamination problems since the microscopic particles can remain airborne for some time after being dispersed. Dissipation time depends on the amount of the agent released, air current activity, temperature, and humidity. Finally, CN cross-contamination between subjects and police officers is common. Officers note that they are often contaminated by the agent when arresting and transporting sprayed subjects. This cross-contamination is thought to be responsible for officers reluctance to use CN.

o-Chlorobenzylidene malononitrile (CS) CN was replaced as a riot-control agent by the U.S. Army and the National Guard around 1960. Officials believed that the replacement, CS, sometimes called "super tear gas" was considerably less toxic and delivered more immediate effects than CN. Following military protocols, American law enforcement agencies subsequently adopted CS in 1965, Like CN, it is classified as a solid, not a gas, since it requires a carrying agent to disperse it into the desired target area. CS, a lacrimating irritant, immediately affects the mucous membranes, producing tears, runny nose, and persistent coughing or sneezing. Additional symptoms of exposure include respiratory distress, accompanied by tightness in the chest, a burning sensation on the skin, and nausea or vomiting. In addition to the physical effects, CS can also cause intense fear, panic, and cognitive disorientation.

Like CN, CS is more effective on those areas of the skin that are moist and is virtually ineffective on animals. Unlike CN, CS is considered to be effective over a wide temperature range. The microparticulate nature of CS results in agent persistency and thus can make decontamination problematic, especially in enclosed or confined areas.

Serious injury to an individual is improbable if CS is used properly. Extensive toxicological testing indicates that, in spite of the potency of CS, it is safer, less toxic, and more effective than CN.

Oleoresin capsicum (OC), a naturally occurring substance derived from the cayenne pepper plant is classified as an inflammatory agent. On contact with OC, the mucous membranes of the eyes, nose, and throat immediately become inflamed and swollen. The symptomatic swelling produces involuntary eye closure due to dilating capillaries; nasal and sinus drainage; constricted airway; and temporary paralysis of the larynx, causing gagging, coughing, and shortness of breath. The extract of peppers causes the blood vessels to dilate and the blood to rush to the upper body; the skin appears inflamed, resembling a burn.

OC's inflammatory properties purportedly render the agent more effective than CN and CS on violent, intoxicated, drugged and mentally ill individuals. Moreover, the symptomatic eye closure and constriction of the respiratory tract explain why OC is so effective on animals. No special decontamination protocols are required for OC because it is biodegradable. Unlike CN and CS irritants, OC will not persist on clothing or affected areas.

Examination of a national sample of in-custody deaths that occurred subsequent to OC use has excluded the agent as a contributory factor. This analysis concluded that, to date, OC has not caused any deaths. Finally, OC does not result in dermatitis, skin depigmentation, or burns.

CN and CS are still used by many law enforcement agencies, especially for tactical use in crowd-control situations. Primarily because of the potential risk of injury and cross-contamination, as well as decontamination problems associated with their use, law enforcement officials have begun to use OC as a less harmful, more dependable alternative. Although available since the mid-1970's, OC was not widely used until recently.

Research Findings

Most police departments in the United States are concerned about officer and suspect safety. In recent years, this concern has focused on injuries to police officers and citizens during arrest confrontations. To meet this problem, departments have sought answers in technology involving less-than-lethal weapons. Aerosol pepper spray is one weapon from the less-than-lethal arsenal that effectively addresses the issue of citizen/officer injury.

The IACP study found that statistical measurements of OC's effectiveness were high, and those related to assaults upon officers and citizen injuries, and use-of-force complaints were low. The study findings showed that OC spray offered advantages over more problematic sprays (such as CN and CS) and that a well-developed OC spray program can provide a variety of operational benefits for law enforcement agencies.

Our experience locally confirms many of the findings of the IACP research study. We found "mace" (usually a CS mixture) to be generally ineffective in restraining violent, combative citizens to the point that very few officers even bothered to carry it by 1990. While there were isolated incidents where it did prove effective on certain individuals, the more common result was that the officers got contaminated by the spray and it ended up causing more harm to the officers than to the person being sprayed. While much has been made of the harmful effects of pepper spray, many of the same (if not more) problems exist with the many variations of mace. To return to mace would be, in our opinion, a large step backwards in terms of officer safety, citizen protection and potential liability for the city.

ACTION

CALENDAR

9-16-97

To: Honorable Mayor and
Members of the City Council

From: Councilmember Dona Spring

Subject: Interim measures on the use of pepper spray

RECOMMENDATION: That Council approve an interim policy that every time pepper spray is used by the police department that the officer involved will fill out a use of pepper spray report similar to the use of force report presently in effect; 2) the report will be sent to the Council and the Police Review Commission within 7 days; 3) that a seal will be put on the trigger of the canister; 4) no pepper spray will be used as crowd control by the BPD; 4) the City of Berkeley will investigate legal and other actions to be taken against UC Berkeley Police over abuse of pepper spray and other weapons; 5) the council will view up to ten minutes of the video of UC Berkeley Police use of pepper spray on demonstrators for affirmative action at the September 16, 1997 council meeting.

BACKGROUND: There is a great deal of concern in the community regarding the use of pepper spray and community members have requested that interim measures be adopted until the council makes a decision on the pepper spray taskforce's recommendations. (I apologize for the short notice on the video, but I will be absent from the council meeting on September 23rd.

FINANCIAL IMPLICATIONS: NONE

CONTACT PERSON: Councilmember Dona Spring 644-3662

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